27320

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 322.

THE UNITED STATES, APPELLANT,

vs.

THE CHOCTAW NATION AND THE CHICKASAW NATION.

No. 323.

THE CHICKASAW FREEDMEN, APPELLANTS,

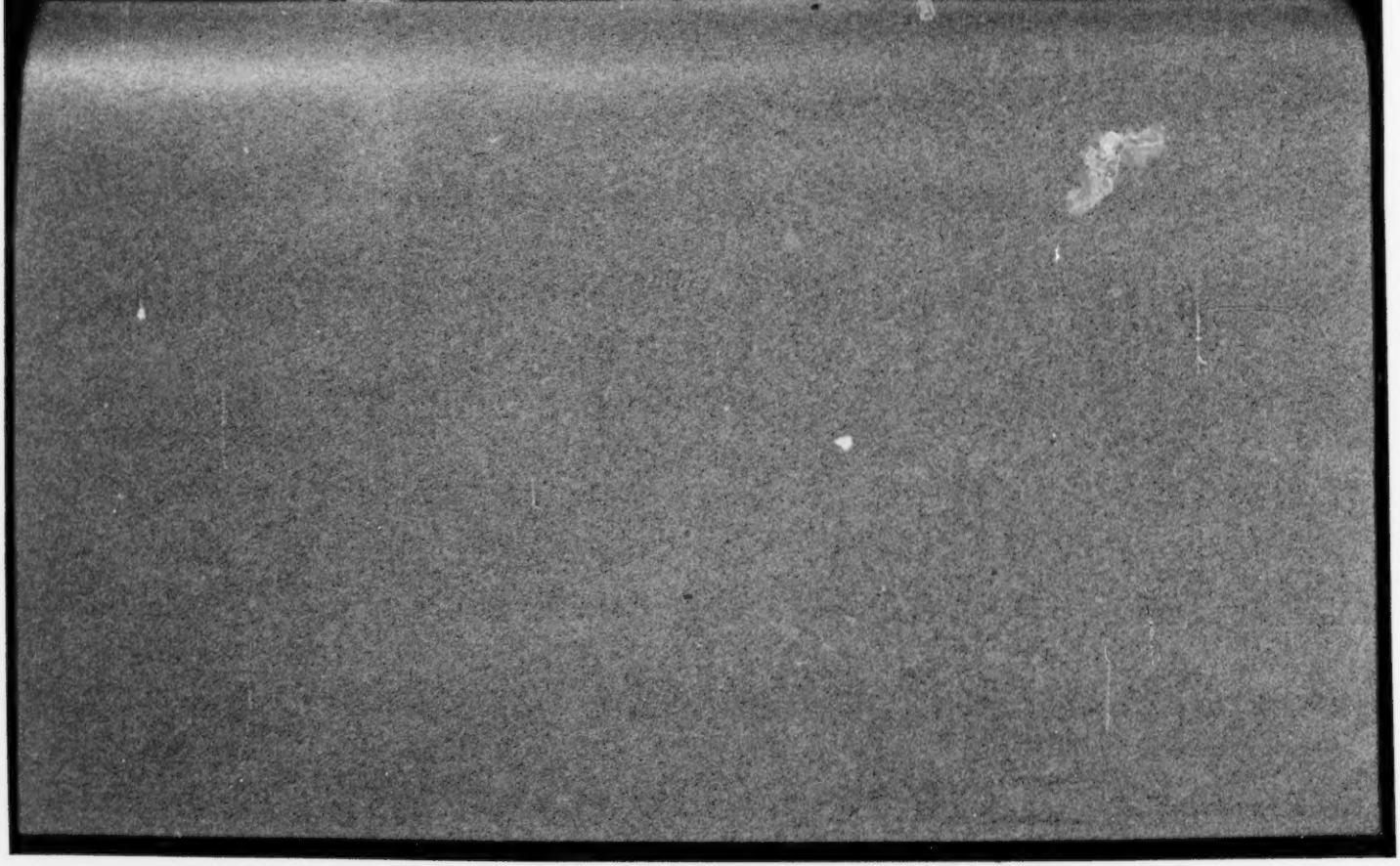
vs.

THE CHOCTAW NATION AND THE CHICKASAW NATION.

APPEALS FROM THE COURT OF CLAIMS.

FILED JUNE 11, 1903.

(18973 AND 18974.)



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28036—03——1

1 In the Court of Claims of the United States.

THE UNITED STATES, COMPLAINANT,
v.
THE CHOCTAW NATION AND THE CHICKASAW NATION and the Chickasaw Freedmen, defendants. } No. 23115.

I. *Bill of interpleader.*

(Filed November 26, 1902. J. R.)

To the honorable the judges of the Court of Claims:

The Attorney-General of the United States, on behalf of the United States, respectfully showeth:

1. For a number of years prior to the year 1866 there resided within the territory of the Chickasaw Nation a number of persons of African descent who were held in slavery in said nation.

2. The treaty between the United States and the Choctaw and Chickasaw Indians, concluded April 23, 1866, and proclaimed July 10, 1866, provided inter alia as follows:

"ARTICLE II. The Choctaws and Chickasaws hereby covenant and agree that henceforth neither slavery nor involuntary servitude,
2 otherwise than in punishment of crime whereof the parties shall have been duly convicted, in accordance with laws applicable to all members of the particular nation, shall ever exist in said nations.

"ARTICLE III. The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98 west longitude, known as the leased district, provided that the said sum shall be invested and held by the United States, at an interest not less than five per cent, in trust for the said nations, until the legislatures of the Choctaw and Chickasaw nations, respectively, shall have made such laws, rules, and regulations as may be necessary to give all the persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by, or belonging to said nations, respectively; and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately upon the enactment of such laws, rules, and regulations the said sum of
3 three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one fourth to the latter, less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred to as within ninety days after the passage of such laws, rules, and regulations shall elect to remove and actually remove from the said nations, respectively. And should said laws, rules, and

regulations not be made by the legislatures of the said nations, respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said Territory in such manner as the United States shall deem proper, the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove; those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations.

"ARTICLE IV. The said nations further agree that all negroes, not otherwise disqualified or disabled, shall be competent witnesses in
4 all civil and criminal suits and proceedings in the Choctaw and Chickasaw courts, any law to the contrary notwithstanding; and they fully recognize the right of the freedmen to a fair remuneration on reasonable and equitable contracts for their labor, which the law should aid them to enforce; and they agree, on the part of their respective nations, that all laws shall be equal in their operation upon the Choctaws, Chickasaws, and negroes, and that no distinction affecting the latter shall at any time be made, and that they shall be treated with kindness and protected against injury; and they further agree that while the said freedmen, now in the Choctaw and Chickasaw nations, remain in said nations, respectively, they shall be entitled to as much land as they may cultivate for the support of themselves and families, in cases where they do not support themselves and families by hiring, not interfering with existing improvements without the consent of the occupant, it being understood that in the event of the making of the laws, rules, and regulations aforesaid, the forty acres aforesaid shall stand in place of the land cultivated as last aforesaid."

3. The legislature of the Chickasaw Nation has taken action at various times in regard to the said Chickasaw freedmen, as follows:

On November 9, 1866, the Chickasaw legislature passed an act declaring it to be the unanimous desire of the legislature that the United States hold the share of the Chickasaw Nation in the $300,000 stipulated for the cession of the "Leased district" for the benefit of the Chicka-
5 saw freedmen and remove them beyond the limits of the Chickasaw Nation, according to the third article of the treaty of 1866.

In 1868 similar action was taken by the Chickasaw legislature asking for the removal, by the United States, of the Chickasaw freedmen from the Chickasaw country.

The law of January 10, 1873, provided as follows:

"SECTION 1. Be it enacted by the legislature of the Chickasaw Nation, That all the negroes belonging to the Chickasaws at the time of the adoption of the treaty of Fort Smith, and living in the Chickasaw Nation at the date thereof, and their descendants, are hereby declared to be adopted in conformity with the third article of the treaty of 1866, between the Choctaws, Chickasaws, and the United States: Provided, however, That the proportional part of the three hundred thousand dol-

lars, specified in the third article of the said treaty, with the accrued interest thereon, shall be paid to the Chickasaw Nation for its sole use and benefit: And provided further, The said adopted negroes of the Chickasaw Nation shall not participate in any part of the said proportional part of the said three hundred thousand dollars, nor be entitled to any benefit from the principal and interest on our invested funds or claims arising therefrom, nor to any part of our common domain, or the profits arising therefrom (except the forty acres per capita provided for in the third article of the treaty of eighteen hundred and sixty-six), nor to any privileges or rights not authorized by treaty stipulations:

6 And provided further, That the said adopted negroes, upon the approval of this act, shall be subject to the jurisdiction and laws of the Chickasaw Nation, and to trial and punishment for offenses against them in every case just as if the said negroes were Chickasaws.

"SEC. 2. And be it further enacted, That this act shall be in full force and effect from and after its approval by the proper authority of the United States; and all laws, or parts of laws, in conflict with this act are hereby repealed."

That act was submitted by the governor of the Chickasaw Nation, by letter of the same date, to the President of the United States, and was submitted by the Secretary of the Interior to the Speaker of the House of Representatives, on February 10, 1873, with recommendation for appropriate legislation for extending the time for the execution of the third article of the treaty. The papers were referred to the Committee on Freedmen Affairs, but no action thereon was had at that time. (See Annual Report Indian Office, 1882, p. 57; and H. R. Ex. Doc. 207, Forty-second Congress, third session.)

The law approved October 18 provided, inter alia, as follows:

"SECTION 1. Be it resolved by the legislature of the Chickasaw Nation, That four commissioners, one from each county of the Chickasaw Nation, shall be elected by joint vote of the senate and house of representatives of the present session of the legislature, to visit the capital of the Choctaw Nation, during the next regular session of the

7 general council of said nation, with instructions to confer with commissioners on the part of the Choctaw Nation, and agree upon some plan whereby the freedmen, former slaves of the Choctaws and Chickasaws, and their descendants, shall be removed from and kept out of the limits of the Choctaw and Chickasaw country."

The law approved October 17, 1876, or 1877, provided, inter alia, as follows:

"SEC. 3. Be it further enacted, That the provisions contained in article 3 of the said treaty, giving the Chickasaw legislature the choice of receiving and appropriating the three hundred thousand dollars therein named, for the use and benefit, or passing such laws, rules, and regulations as will give all persons of African descent certain rights and privileges, be, and it is hereby, declared to be the unanimous consent of the Chickasaw legislature, that the United States shall keep and hold said sum of three hundred thousand dollars for the benefit of the said negroes, and the governor of the Chickasaw Nation is hereby requested to notify the Government of the United States that it is the wish of the legislature of the Chickasaw Nation that the Government of the United States

remove the said negroes beyond the limits of the Chickasaw Nation, according to the requirements of the third article of the treaty of April 28, 1866."

The law of October 22, 1885, provided, inter alia, as follows:

"SECTION 1. Be it enacted by the legislature of the Chickasaw Nation, That the Chickasaw people hereby refuse to accept or adopt
8 the freedmen as citizens of the Cherokee Nation upon any terms or conditions whatever, and respectfully request the governor of our nation to notify the Department at Washington of the action of the legislature in the premises.

"SEC. 2. Be it further enacted, That the governor is hereby authorized and directed to appoint two competent and discreet men, of good judgment and business qualifications, to visit Washington City, D. C., during the next session of Congress, and memorialize that body to provide a means of removal of the freedmen from the Chickasaw Nation to the country known as Ok la ho ma, in the Indian Territory, or to make some suitable disposition of the freedmen question, so that they be not forced upon us as equal citizens of the Chickasaw Nation."

The resolution of October 4, 1887, provided, inter alia, as follows:

"And whereas the Chickasaw people have kindly and friendly feeling toward the freedmen, their former slaves, and wishing them to receive full valuation of the places they live upon for their support, as provided for in section 4 of the treaty of 1866, do hereby agree that they shall have two years from the passage of this act to sell their improvements in the Chickasaw Nation to the best advantage, that no loss may accrue to them: Therefore,

"Be it resolved by the legislature of the Chickasaw Nation, That the nation shall refund to the United States the sum of $55,000, to be used in removing the freedmen in the Chickasaw Nation to their new
9 home, as provided under the third and fourth articles of the treaty of 1866, made between the United States and the Choctaw and Chickasaw nations of Indians. (See Sen. Ex. Doc. 166, Fiftieth Congress, first session.)"

4. The act of Congress of August 15, 1894, section 18 (28 Stats., 336), provides as follows:

"That the approval of Congress is hereby given to 'An act to adopt the negroes of the Chickasaw Nation,' and so forth, passed by the legislature of the Chickasaw Nation and approved by the governor thereof January 10, 1873, particularly as set forth in a letter from the Secretary of the Interior transmitting to Congress a copy of the aforesaid act contained in House Executive Document Numbered Two hundred and seven, Forty-second Congress, third session."

5. The agreement between the United States and the Choctaw and Chickasaw tribes of Indians, dated April 23, 1897, and ratified and confirmed by the act of June 28, 1898, section 29 (30 Stats., 505), provides, inter alia, as follows:

"That all the lands within the Indian Territory belonging to the Choctaw and Chickasaw Indians shall be allotted to the members of said tribes, so as to give to each member of these tribes, so far as possible, a fair and equal share thereof, considering the character and fertility of the soil and the location and value of the lands.

"The lands allotted to the Choctaw and Chickasaw freedmen
10 are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw and Chickasaw tribe, so as to reduce the allotment to the Choctaws and Chickasaws by the value of the same.

"That the said Choctaw and Chickasaw freedmen who may be entitled to allotments of 40 acres each shall be entitled each to land equal in value to 40 acres of the average land of the two nations."

6. The agreement between the United States and the Choctaw and Chickasaw nations, made the 21st day of March, 1902, ratified and confirmed by the act of July 1, 1902, chapter 1362, provides as follows:

"11. There shall be allotted to each member of the Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, as herein provided, land equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allottable land of the Choctaw and Chickasaw nations, to conform, as nearly as may be, to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements. For the purpose of making allottments and design'ing
homesteads hereunder, the forty-acre or quarter-quarter subdivi-
11 sions established by the Government survey may be dealt with as if further subdivided into four equal parts in the usual manner, thus making the smallest legal subdivision ten acres, or a quarter of a quarter of a quarter of a section.

"13. The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate or allotment.

"15. Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided."

7. The same agreement provides as follows:

"36. Authority is hereby conferred upon the Court of Claims to determine the existing controversy respecting the relations of the Chickasaw freedmen to the Chickasaw Nation and the rights of such freedmen in the lands of the Choctaw and Chickasaw nations under the third article of the treaty of eighteen hundred and sixty-six between the United States and the Choctaw and Chickasaw nations, and under any and all laws subsequently enacted by the Chickasaw legislature or by Congress.

"37. To that end the Attorney-General of the United States is hereby directed, on behalf of the United States, to file in said Court of Claims within sixty days after this agreement becomes effective, a bill of interpleader against the Choctaw and Chickasaw nations and the
12 Chickasaw freedmen, setting forth the existing controversy between the Chickasaw Nation and the Chickasaw freedmen, and praying that the defendants thereto be required to interplead and settle their respective rights in such suit.

"38. Service of process in the suit may be had on the Choctaw and Chickasaw nations, respectively, by serving upon the principal chief of the former and the governor of the latter a certified copy of the bill, with a notice of the time for answering the same, which shall not be less than thirty nor more than sixty days after such service, and may be had upon the Chickasaw freedmen by serving upon each of three known and recognized Chickasaw freedmen a certified copy of the bill, with a like notice of the time for answering the same, and by publishing a notice of the commencement of the suit, setting forth the nature and prayer of the bill, and the time for answering the same, for a period of three weeks, in at least two weekly newspapers having general circulation in the Chickasaw Nation.

"39. The Choctaw and Chickasaw nations, respectively, may in the manner prescribed in sections twenty-one hundred and three to twenty-one hundred and six, both inclusive, of the Revised Statutes, employ counsel to represent them in such suit and protect their interests therein; and the Secretary of the Interior shall employ competent counsel to represent the Chickasaw freedmen in said suit and to protect their interests therein; and the compensation of counsel so employed for the
13 Chickasaw freedmen, including all costs of printing their briefs and other incidental expenses on their part not exceeding six thousand dollars, shall be paid out of the Treasury of the United States upon certificate of the Secretary of the Interior setting forth the employment and the terms thereof, and stating that the required services have been duly rendered; and any party feeling aggrieved at the decree of the Court of Claims, or any part thereof, may, within sixty days after the rendition thereof, appeal to the Supreme Court; and in each of said courts the suit shall be advanced for hearing and decision at the earliest practicable time.

"73. This agreement shall be binding upon the United States and the Choctaw and Chickasaw nations and all Choctaws and Chickasaws, when ratified by Congress and by a majority of the whole number of votes cast by the legal voters of the Choctaw and Chickasaw tribes in the manner following: The principal chief of the Choctaw Nation and the governor of the Chickasaw Nation shall, within one hundred and twenty days after the ratification of this agreement by Congress, make public proclamation that the same shall be voted upon at any special election to be held for that purpose within thirty days thereafter, on a certain day therein named; and all male citizens of each of the said tribes qualified to vote under the tribal laws shall have a right to vote at the election precinct most convenient to his residence, whether the same be within the bounds of his tribe or not. And if this agreement be ratified by said
14 tribes as aforesaid, the date upon which said election is held shall be deemed to be the date of final ratification.

"74. The votes cast in both the Choctaw and Chickasaw nations shall be forthwith returned and duly certified by the precinct officers to the national secretaries of said tribes, and shall be presented by said national secretaries to a board of commissioners consisting of the principal chief and the national secretary of the Choctaw Nation and the governor and national secretary of the Chickasaw Nation and two members of the commission to the Five Civilized Tribes; and said board shall meet without

delay at Atoka, Indian Territory, and canvass and count said votes, and make proclamation of the result."

8. The said agreement between the United States and the Choctaws and Chickasaws having been ratified and confirmed by the act of July 1, 1902, as aforesaid, and having been ratified in accordance with the provisions of paragraphs 73 and 74 of said agreement, by elections held on September 25, 1902, became effective on that date.

Wherefore, the Attorney-General prays your honorable court:

1. That the defendants may answer the premises, and that the defendants, to wit, the Choctaw and Chickasaw nations on the one part, and the Chickasaw freedmen on the other part, may be decreed to interplead and settle and determine between themselves the existing controversy respecting the relations of the Chickasaw freedmen and the Chickasaw
15 Nation, and the rights of such freedmen in the land of the Choctaw and Chickasaw nations under the third article of the treaty of April 28, 1866, between the United States and the Choctaw and Chickasaw nations, and under any and all laws subsequently enacted by the Chickasaw legislature or by Congress.

2. Such other and further relief as the nature of the case may require.

P. C. KNOX,
Attorney-General.

17 THE UNITED STATES, COMPLAINANT,
vs.
THE CHOCTAW NATION AND THE CHICKASAW NATION and the Chickasaw Freedmen, defendants. } No. 23115.

II. *Answer of the Choctaw and Chickasaw Nations.*

(Filed January 26, 1903.)

To the Honorable the Judges of the Court of Claims:

Come now the Choctaw Nation and the Chickasaw Nation, and, answering the bill of interpleader herein, respectfully show:

I.

That the members of the Choctaw Nation or tribe of Indians and the members of the Chickasaw Nation or tribe of Indians are the owners of the lands embraced within the limits of the Choctaw Nation and the Chickasaw Nation, more particularly described in the treaty
18 between the Choctaw and Chickasaw nations or tribes of Indians and the United States of America, entered into on the twenty-second day of June, eighteen hundred and fifty-five, as follows, to wit:

ARTICLE I.

"The following shall constitute and remain the boundaries of the Choctaw and Chickasaw country, viz: Beginning at a point on th Arkansas River, one hundred paces east of old Fort Smith, where the western boundary line of the State of Arkansas crosses the said river and running thence due south to Red River; thence up Red River to the

point where the meridian of one hundred degrees west longitude crosses the same; thence north along said meridian to the main Canadian River; thence down said river to its junction with the Arkansas River; thence down said river to the place of beginning.

"And pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal, undivided interest in the whole: Provided, however, no part thereof shall ever be sold without the consent of both tribes; and that said land shall revert to the United States if said Indians and their heirs become extinct or abandon the same."

II.

The defendants, the Choctaw and Chickasaw nations or tribes of Indians, admit that for a number of years prior to the year eighteen hundred and sixty-six there resided within the territory of the Chickasaw Nation a number of persons of African descent who were held in slavery in said nation.

III.

Said nations admit that the treaty between the United States
19 and the Choctaw and Chickasaw nations, concluded April twenty-eighth, eighteen hundred and sixty-six, and proclaimed July tenth, eighteen hundred and sixty-six, provided, inter alia, as follows:

"ARTICLE II.

"The Choctaws and Chickasaws hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in punishment of crime, whereof the parties shall have been duly convicted in accordance with the laws applicable to all members of the particular nation, shall ever exist in said nations.

"ARTICLE III.

"The Choctaws and Chickasaws, in consideration of the sum of $300,000.00, hereby cede to the United States the territory west of the 98th degree, west longitude, known as the Leased District, provided that the said sum shall be invested and held by the United States at an interest not less than five per cent, in trust for the said nations, until the legislatures of the Choctaw and Chickasaw nations, respectively, shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent, resident in the nations at the date of the treaty of Fort Smith, and their descendants heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by or belonging to said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants forty acres each of the land of said

nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately on the enactment of such laws, rules, and regulations the said sum of $300,000 shall be paid to the said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one-fourth to the latter, less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred to as, within ninety days after the passage of such laws, rules, and regulations, shall elect to remove and actually remove from the said nations respectively. And should the said laws, rules, and regulations not be made by the legislatures of the said nations, respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said Territory in such manner as the United States shall deem proper, the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove; those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations.

"ARTICLE IV.

"The said nations further agree that all negroes, not otherwise disqualified or disabled, shall be competent witnesses in all civil or criminal suits and proceedings in the Choctaw and Chickasaw courts, any law to the contrary notwithstanding; and they fully recognize the right of the freedmen to a fair remuneration on reasonable and equitable contracts for their labor, which the law should aid them to enforce. And they agree, on the part of their respective nations, that all laws shall be equal in their operation upon Choctaws, Chickasaws, and negroes, and that no distinction affecting the latter shall at any time be made, and that they shall be treated with kindness and be protected against injury; and they further agree, that while the said freedmen, now in the Choctaw and Chickasaw nations, remain in said nations respectively, they shall be entitled to as much land as they may cultivate for the support of themselves and families, in cases where they do not support themselves and families by hiring, not interfering with existing improvements without the consent of the occupants, it being understood that in the event of the laws, rules, and regulations aforesaid, the forty acres aforesaid shall stand in place of the land cultivated as last aforesaid."

IV.

The defendants, The Choctaw and Chickasaw Nations or Tribes of Indians, state that the Chickasaw legislature had no power to take any action which would bind these defendants in regard to said Chickasaw freedmen after July tenth, eighteen hundred and sixty-eight, under the

provisions of the said article three of the treaty of eighteen hundred and sixty-six, and that the only legislative action taken by the legislature of the Chickasaw Nation before the expiration of the two years from July tenth, eighteen hundred and sixty-six, the date of the treaty, was as follows:

On November ninth, eighteen hundred and sixty-six, the Chickasaw legislature passed an act which contained the following:

"SECTION 1. Be it enacted by the legislature of the Chickasaw Nation, That whereas a treaty was concluded at Washington city on the 28th of April, 1866, by commissioners duly appointed on the part of the Chickasaws, Choctaws, and the United States Government, which said treaty was ratified with amendments by the United States Senate and confirmed by the President, the Chickasaw legislature does hereby consent and confirm the said treaty and amendments made by the Senate of the United States.

"SECTION 2. * * *

"SECTION 3. Be it further enacted, That the provisions contained in article 3d, of the said treaty, giving the Chickasaw legislature the choice of receiving and appropriating the three hundred thousand dollars named for the use and benefit of the Chickasaws, or passing such laws, rules, and regulations as will give all persons of African descent certain rights and privileges, be, and is hereby declared to be the unanimous consent of the Chickasaw legislature; that the United States shall keep and hold said sum of three hundred thousand dollars for the benefit of the said negroes. And the governor of the Chickasaw Nation is hereby requested to notify the Government of the United States that it is the wish of the legislature of the Chickasaw Nation that the Govern-
22 ment of the United States remove the said negroes beyond the limits of the Chickasaw Nation, according to the requirements of the 3d article of the treaty of April 28th, 1866."

On the twenty-third day of July, eighteen hundred and sixty-eight, the Secretary of the Interior addressed to the President pro tempore of the United States Senate an official communication, which contained the following paragraph:

"Two years from the ratification of the treaty having expired, and the legislatures of the Choctaw and Chickasaw nations having failed to make such laws, rules, and regulations in regard to said persons of African descent resident in said nations at the date of the treaty of April 28, 1866, it becomes the duty of the United States, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove."

The defendants, The Choctaw and Chickasaw Nations or Tribes of Indians, admit the enactment by the legislature of the Chickasaw Nation of the act of January tenth, eighteen hundred and seventy-three, as set forth in the bill of interpleader of the complainant, and that the same was submitted by the governor of the Chickasaw Nation, by letter of the same date, to the President of the United States, and that the same was submitted by the Secretary of the Interior to the Speaker of the House of Representatives on February tenth, eighteen hundred and seventy-three, with a recommendation for appropriate legislation, as stated in said bill; but said defendants say that the Chickasaw legislature had no power to affect the status of said freedmen by said act, and that no action

was had thereon by the United States of America at that time, and the defendants state that no action was ever had thereon by the United States of America until August fifteenth, eighteen hundred and ninety-four, when Congress gave its approval to said act of the Chickasaw legislature of January tenth, eighteen hundred and seventy-three,
23 and that before the passage of said act of Congress said act of January tenth, eighteen hundred and seventy-three, had been repealed by the Chickasaw legislature, as will appear from the following acts and proceedings had from time to time:

On the ninth day of November, eighteen hundred and seventy, the governor of the Chickasaw Nation, in pursuance of the action of the legislature of the Chickasaw Nation, issued the following proclamation:

"Whereas it having become necessary, under the treaty of April 28th, 1866, that the freedmen were put upon the same footing with the other citizens of the United States, I, William P. Brown, governor of the Chickasaw Nation, do this day issue this, my proclamation, requiring all freedmen who are living within the limits of the Chickasaw Nation to obtain 'permits,' as is required by the laws of the Chickasaw Nation (of the citizens of the United States) by the 1st day of January, A. D. 1871.

"Given under my hand and seal of office this the 9th day of November, A. D. 1870.

"WM. P. BROWN,
"*Governor Chickasaw Nation.*"

On October eighteenth, eighteen hundred and seventy-six, the legislature of the Chickasaw Nation passed a resolution as follows:

"Whereas the governor of the Chickasaw Nation has recommended to this legislature that commissioners be sent, on the part of the Chickasaw Nation, to confer with commissioners on the part of the Choctaw Nation in relation to the freedmen in said nations and agree with the Choctaws upon some plan for the final settlement of all questions relating to all freedmen;

"And whereas it is understood that the governor is in favor of the removal of all freedmen, former slaves of the Choctaws and Chickasaws, from the limits of the Choctaw and Chickasaw country, is of the opinion that the same may be accomplished; therefore,

"SECTION 1. Be it resolved by the legislature of the Chickasaw
24 Nation, that four commissioners, one from each county of the Chickasaw Nation, shall be elected by joint vote of the senate and house of representatives of the present session of the legislature to visit the capital of the Choctaw Nation during the next regular session of the general council of said nation, with instructions to confer with the commissioners on the part of the Choctaw Nation and agree upon some plan whereby the freedmen, former slaves of the Choctaws and Chickasaws and their descendants, shall be removed from and kept out of the limits of the Choctaw and Chickasaw country.

"SEC. 2. * * *"

On October seventeenth, eighteen hundred and seventy-seven, the legislature of the Chickasaw Nation passed an act, which was duly approved, as follows:

"SEC. 1. * * *

"SEC. 2. * * *

"SEC. 3. Be it further enacted that the provisions contained in said article 3 of the treaty giving the Chickasaw legislature the choice of receiving and appropriating the three hundred thousand dollars therein named for the use and benefit of passing such laws, rules, and regulations as will give all persons of African descent certain rights and privileges, be, and it is hereby declared to be, the unanimous consent of the Chickasaw legislature that the United States shall keep and hold said sum of three hundred thousand dollars for the benefit of the said negroes, and the governor of the Chickasaw Nation is hereby requested to notify the Government of the United States that it is the wish of the legislature of the Chickasaw Nation that the Government of the United States remove the said negroes beyond the limits of the Chickasaw Nation according to the requirements of the third article of the treaty of April 28, 1866."

On May sixth, eighteen hundred and eighty-two, the legislature of the Chickasaw Nation passed an act, which was duly approved, as follows:

"SECTION 1. Be it enacted by the legislature of the Chickasaw Nation, that Wm. L. Byrd and B. F. Overton, delegates of the Chickasaw Nation, are hereby fully authorized and directed to enter their protest in behalf of the Chickasaw Nation against the ratifying by Congress of the United States of an act passed by the general council of the Choctaw Nation adopting and granting to the freedmen of the Choctaw Nation full rights of citizenship without conferring with the Chickasaws or obtaining their consent to said adoption; and said delegates are hereby fully authorized and directed to represent the Chickasaw people in any and all measures that might be presented before the Department and Congress of the United States affecting the interests of our people and country.

"SEC. 2. Be it further enacted by the legislature of the Chickasaw Nation, that Wm. L. Byrd and B. F. Overton, Chickasaw delegates to Washington City, D. C., be allowed the sum of fifteen hundred dollars each as full compensation for their services, and this amount shall apply to the money already borrowed by the governor from the treasurer to defray the expenses of the delegates.

"SEC. 3. Be it further resolved, that this act take effect and be in force from and after its passage."

On October twenty-second, eighteen hundred and eighty-five, the legislature of the Chickasaw Nation passed an act, which was duly approved, as follows:

"Whereas the 3d article of the treaty of 1866 between the United States and the Choctaw and Chickasaw nations stipulates that the territory lying west of the 98th degree of west longitude, known as the Leased District, be ceded to the United States Government for three hundred thousand dollars ($300,000.00), the consideration of three hundred thousand dollars, which sum shall be held in trust by the United States for said nations, at a certain rate of interest, until each respective nation elects within two years after the ratification of said treaty to make certain laws, rules, and regulations giving the freedmen once held as slaves by said nation the rights, privileges, and immunities of citizens of said nations, except in their annuities and public domain, etc.;

"And whereas it provides, further, that if said laws, rules, and regu-

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lations are not made within two years, by said nations, from the
26 ratification of aforesaid treaty, then the United States Government promises to remove, within 90 days from the expiration of the two years, such of said freedmen as are willing to remove from said nations, using the aforesaid three hundred thousand dollars for the use and benefit of said freedmen in their removal, etc., and those choosing to remain or might return after removing to receive no part or benefit from the said three hundred thousand dollars, and shall be upon the same footing as other citizens of the United States;

"And whereas the United States has failed to remove said freedmen agreeable to the stipulations of said treaty and left them here among us for a long time, recognized by us as occupying the same status as other citizens;

"And whereas the Chickasaw people, in justice to their posterity, have not made said laws, rules, and regulations as provided for in the aforesaid article of said treaty, for the following reasons, to wit:

"1st. That the Chickasaw people can not see any reason or just cause why they should be required to do more for their freed slaves than the white people have done in the slave-holding States for theirs.

"2nd. That it was by the example and teachings of the white man that we purchased, at enormous prices, their slaves and used their labor, and were forced by the result of their war to liberate our slaves at a great loss and sacrifice on our part, and we do not hold or consider our nations responsible in nowise for their present situation; therefore,

"SECTION 1. Be it enacted by the legislature of the Chickasaw Nation, that the Chickasaw people hereby refuse to accept or adopt the freedmen as citizens of the Chickasaw Nation upon any terms or conditions whatever, and respectfully request the governor of our nation to notify the Department at Washington of the action of the legislature in the premises.

"SEC. 2. * * *
"SEC. 3. * * *
"SEC. 4. * * *
"SEC. 5. * * *"

27 V.

The defendants, the Choctaw and Chickasaw nations or tribes of Indians, further answering the bill of interpleader herein, state that the said Chickasaw freedmen have no rights whatever in the lands of the Choctaw and Chickasaw nations under the third article of the treaty of eighteen hundred and sixty-six, between the United States and the Choctaw and Chickasaw nations, or under any and all laws subsequently enacted by the Chickasaw legislature or by Congress, and that the complainant, the United States of America, is indebted to the defendants, the Choctaw and Chickasaw nations, for the full value of all lands which may be allotted to said freedmen under the provisions of the agreement between the United States and the Choctaw and Chickasaw nations, entered into on the twenty-first day of March, nineteen hundred and two, and ratified and confirmed by act of Congress approved July first, nineteen hundred and two, and set forth in said bill of interpleader.

Wherefore these defendants, the Choctaw and Chickasaw nations, pray that a decree shall be rendered in their favor and against the United States of America for the value of the lands allotted to the Chickasaw freedmen, as ascertained by the appraisal thereof made by the Commission to the Five Civilized Tribes for the purpose of allotment, as provided in said agreement.

MANSFIELD, MCMURRAY, AND CORNISH,
Attorneys for The Choctaw Nation and The Chickasaw Nation, Defendants.

A. A. HOEHLING, Jr.,
Of Counsel.

29 THE UNITED STATES, COMPLAINANT,
v.
THE CHOCTAW NATION AND THE CHICKASAW Nation and the Chickasaw Freedmen, defendants. } No. 23115.

III. *The answer of the Chickasaw freedmen, one of the above-named defendants, to the bill of interpleader, and for relief.*

(Filed January 26, 1903.)

1. The Chickasaw freedmen, one of the defendants above-named, appear herein by their counsel, said counsel having been duly appointed to represent them in this cause by the Secretary of the Interior pursuant to a provision in section 39 of an act of Congress "to ratify and confirm an agreement with the Choctaw and Chickasaw tribes of Indians, and for other purposes," approved July 1, 1902. A certificate of said appointment is filed herewith.

2. These defendants admit the allegations in each of the sections numbered 1 to 8, inclusive, in said bill of interpleader; and, having thus answered, beg leave of the court to set forth herein their claims and rights to citizenship and property and to pray for alternative relief, with like effect as though the same were set up in an original or cross bill.

30 3. By treaty of October 20, 1832, the Chickasaw Indians ceded to the United States, for the purposes of sale, their country east of the Mississippi River, and about two years later were permitted by the United States to leave their country and migrate west of the Mississippi River. By the treaty between the Choctaw and Chickasaw tribes of Indians of June 17, 1837, the Chickasaw tribe was permitted to occupy, in common with the Choctaw Nation, certain territory within the United States, and by a treaty between said Indian tribes and the United States, dated June 22, 1855, such occupation by said tribes was confirmed. The land so occupied in common is described as follows, to wit: "Beginning at a point on the Arkansas River, one hundred paces east of old Fort Smith, where the western boundary line of the State of Arkansas crosses the said river, and running thence due south to Red River; thence up Red River to the point where the meridian of one hundred degrees west longitude crosses the same; thence north along said meridian to the main Canadian River; thence down said river to

its junction with the Arkansas River; thence down said river to the place of beginning."

4. The United States, by said treaty last mentioned, guaranteed the lands thus described "to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal, undivided interest in the whole: Provided, however, no part thereof shall ever be sold without the consent of both tribes, and that said lands shall revert to the United States if said Indians and their heirs become extinct or abandon the same."

5. By said treaty it was also further provided that said "Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the ninety-eighth degree of west
31 longitude for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein; * * * Provided, however, The territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore." This district is commonly known, and is hereinafter referred to, as the "leased district."

6. The Choctaws and Chickasaws are separate nations, the Chickasaw Nation having a written constitution, a legislative body, judicial and executive officers; but they are dependent nations, subject to the general jurisdiction, authority, and sovereignty of the United States. Pursuant to said treaties and the laws of the United States it became and was the duty of said Choctaw and Chickasaw nations to observe peaceful and friendly relations with the United States and to recognize the general urisdiction, authority, and sovereignty of the United States over said territory, subject only to the right of said Indian nations to occupy said described territory and to govern and control their internal affairs according to their own customs and laws. Any allotment of said lands in severalty among the members of said Indian nations, and the rights of members to such allotments when made, and the rights of either of said nations, or any member thereof, or of any person to any moneys held by the United States for said nations, are matters under the general jurisdiction and authority of the United States, and no allotment in said lands or rights to such funds can be determined by said nations independently.

7. Prior to the outbreak of the civil war in 1861, slavery existed in said Indian nations, and certain people of African descent were held in involuntary servitude by said Indians. Upon the breaking out of the civil war aforesaid, and the organization of the slave States into what is commonly known as the Confederacy, the said Choctaw and Chickasaw nations, disregarding their treaty relations with the United States
32 as dependent nations, joined the said Confederacy by entering into treaty relations with the same, and took up arms against the United States.

8. On the 22d day of September, 1862, the President of the United States issued a proclamation containing, among other things, the following, to wit: "That on the 1st day of January, 1863, all persons held as slaves within any State, or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free." By proclamation of January 1, 1863, the

President, as Commander in Chief of the Army, etc., and "as a fit and necessary war measure for suppressing said rebellion," declared all persons held as slaves within certain States, and designated parts of States, free. The thirteenth amendment to the Constitution of the United States, in force December 18, 1865, provides that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." By this provision of the Constitution, the act of emancipating all slaves within the territory and jurisdiction of the United States was complete, and by virtue thereof all persons held in involuntary servitude, except as a punishment for crime, etc., by any dependent State or nation within the territory of the United States, became and were free; and these defendants allege that all slaves held by the Choctaw and Chickasaw nations became entitled to all the rights of free men in the United States upon the adoption of said thirteenth amendment.

9. Said freedmen, to the number of about 9,066, according to the returns of the Twelfth Census of the United States, are the survivors and the descendants of the slaves held by the Chickasaw Nation, one of the defendants above named.

33 10. In addition to the Choctaw and Chickasaw nations of Indians, who joined said Confederacy, the Creeks, Cherokees, and Seminoles rebelled against the United States, and by a treaty entered into at Fort Smith, Arkansas, on the 10th day of September, 1865, between Commissioners designated by the President of the United States and persons representing the Choctaw and Chickasaw nations and the other three nations comprising what is known as the Five Civilized Tribes, it is recited and agreed as follows, to wit: "Whereas the aforesaid nations and tribes, or bands of Indians, or portions thereof, were induced by the machinations of the emissaries of the so-called Confederate States to throw off their allegiance to the Government of the United States, and to enter into treaty stipulations with said so-called Confederate States, whereby they have made themselves liable to a forfeiture of all rights of every kind, character, and description, which had been promised and guaranteed to them by the United States; and whereas the Government of the United States has maintained its supremacy and authority within its limits; and whereas it is the desire of the Government to act with magnanimity with all parties deserving its clemency, and to reestablish order and legitimate authority among the Indian tribes; and whereas the undersigned, representatives of parties connected with said nations and tribes of Indians, have become satisfied that it is for the general good of the people to reunite with, and be restored to, the relations which formerly existed between them and the United States, and as indicative of our personal feelings in the premises, and of our several nations and tribes, so far as we are authorized and empowered to speak for them; and whereas questions have arisen as to the status of the nations, tribes, and bands that have made treaties with the enemies of the United States, which are now being discussed, and our relations settled by treaty with the United States commissioners now at Fort Smith for that purpose:

34 "The undersigned do hereby acknowledge themselves to be under the protection of the United States of America, and cove-

nant and agree that hereafter they will in all things recognize the Government of the United States as exercising exclusive jurisdiction over them, and will not enter into any allegiance or conventional arrangement with any State, nation, power, or sovereign whatsoever; that any treaty of alliance for cession of land, or any act heretofore done by them or any of their people, by which they renounce their allegiance to the United States, is hereby revoked, canceled, and repudiated.

"In consideration of the foregoing stipulations made by the members of the respective nations and tribes of Indians present, the United States, through its commissioners, promises that it will reestablish peace and friendship with all the nations and tribes of Indians within the limits of the so-called Indian country; that it will afford ample protection for the security of the persons and property of the respective nations or tribes, and declares its willingness to enter into treaties to arrange and settle all questions relating to, and growing out of, former treaties of said nations with the so-called Confederate States, at this council now convened for that purpose, or at such time in the future as may be appointed."

The representatives of the Choctaw and Chickasaw nations signed the above treaty, and subsequently the said treaty was ratified by the legislature of the Chickasaw Nation.

Thereafter, to wit, on the 28th day of April, 1866, a treaty was entered into between the United States and the Choctaw and Chickasaw nations, which treaty, among other things, provided that "Permanent peace and friendship are hereby established between the United States and said nations," and which treaty recognized the existing freedom of all persons within the territory of said Indian nations; but, desiring to obligate the said nations to observe in the future by their laws and administration the freedom of all persons within their jurisdiction, the United States caused to be inserted in Article II of said treaty the following provision:

35 "The Choctaws and Chickasaws hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in punishment of crime whereof the party shall have been duly convicted, in accordance with laws applicable to all members of the particular nation, shall ever exist in said nations."

11. It is further provided in said last-named treaty (Article III) as follows, to wit: "The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district, provided that the said sum shall be invested and held by the United States, at an interest not less than five per cent, in trust for the said nations, until the legislatures of the Choctaw and Chickasaw nations, respectively, shall have made such laws, rules, and regulations as may be necessary to give all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by or belonging to said nations respectively; and also to give to such persons who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chicka-

saws and Kansas Indians have made their selections, as herein provided; and immediately on the enactment of such laws, rules, and regulations, the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportions of three-fourths to the former and one-fourth to the latter—less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such per-
36 sons of African descent before referred to as within ninety days after the passage of such laws, rules, and regulations, shall elect to remove and actually remove from the said nations respectively. And should the said laws, rules, and regulations not be made by the legislatures of the said nations, respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem proper, the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove; those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations."

12. The Choctaw and Chickasaw nations did not, nor did either of them, during the two-year limitation mentioned in said Article III, above quoted, pass any laws, rules, or regulations giving to said freedmen resident in said nations at the date of the treaty of Fort Smith, and their descendants, the rights, privileges, and immunities, including the right of suffrage, nor did they give them each forty acres of land, nor make any provision whatsoever regarding their rights in said nations or to any property belonging to said nations, nor did the United States remove said freedmen from the territory occupied by said nations.

13. By and under the laws of the United States the said Indian nations are independent and self-governing in matters pertaining to the internal affairs of said nations, and have a right to determine who are to
37 be adopted into said nations and become citizens thereof, and upon what terms and conditions such adoption may be effected, and the United States has not at any time undertaken to control or in any manner to direct said Indian nations in the matter of the adoption of persons into the nations, that subject being under the exclusive and independent control of the Indian nations. It has, however, been the policy of the United States to secure by treaty the adoption of the freedmen by the Indian nations which had held them in slavery, so as to secure for said freedmen the opportunities of education and self-support.

14. Prior to 1867, the constitution of the Chickasaw Nation provided, among other things, as follows, to wit: "The legislature shall have the power, by law, to admit, or adopt, any person to citizenship in this nation, except a negro, or descendant of a negro: Provided, however, that such an admission, or adoption, shall not give a right, further than to settle and remain in the nation, and to be subject to its laws. * * * The legislature of this nation shall have no power to pass laws for the emancipation of slaves without the consent of their

owners, nor without paying their owners previous to such emancipation a full equivalent in money for the slaves so emancipated. They shall have the right to pass laws to prevent the owners of slaves to emancipate them, saving the rights of creditors. They shall have full power to pass laws which will oblige the owners of slaves to treat them with humanity—to provide for their necessary food and clothing—to abstain from all injuries to them, extending to life or limb: Provided, also, that laws be passed to prohibit the introduction into this nation of slaves who have committed high crimes in violation of the laws of other countries."

By a new constitution, adopted August 16, 1867, such restrictions upon the legislature were removed and did not thereafter exist,
38 and on, to wit, the 10th day of January, 1873, an act was passed by the Chickasaw legislature, and promulgated in words as follows, to wit:

"SECTION 1. Be it enacted by the legislature of the Chickasaw Nation, that all the negroes belonging to the Chickasaws at the time of the adoption of the treaty of Fort Smith, and living in the Chickasaw Nation at the date thereof, and their descendants, are hereby declared to be adopted in conformity with the third article of the treaty of 1866, between the Choctaws, Chickasaws, and the United States: Provided, however, that the proportional part of the three hundred thousand dollars, specified in the third article of the said treaty, with the accrued interest thereon, shall be paid to the Chickasaw Nation for its sole use and benefit: And provided further, that said adopted negroes of the Chickasaw Nation shall not participate in any part of the said proportional part of the said three hundred thousand dollars, nor be entitled to any benefit from the principal and interest on our invested funds or claims arising therefrom, nor to any part of our common domain, or the profits arising therefrom (except the forty acres per capita provided for in the third article of the treaty of eighteen hundred and sixty-six), nor to any privileges or rights not authorized by treaty stipulations: And provided further, that the said adopted negroes, upon the approval of this act, shall be subject to the jurisdiction and laws of the Chickasaw Nation, and to trial and punishment for offenses against them in every case just as if the said negroes were Chickasaws.

"SECTION 2. And be it further enacted, that this act shall be in full force and effect from and after its approval by the proper authority of the United States; and all laws, or parts of laws, in conflict with this act are hereby repealed."

By an act of the Choctaw Council, approved May 21, 1883, it was enacted, among other things, as follows, to wit: "That all per-
39 sons of African descent resident in the Choctaw Nation at the date of the treaty of Fort Smith, September 13, 1865, and their descendants, formerly held in slavery by the Choctaws or Chickasaws, are hereby declared to be entitled to and invested with all the rights, privileges, and immunities, including the right of suffrage, of citizens of the Choctaw Nation, except in the annuities, moneys, and the public domain of the nation."

Thereafter by an act of Congress, approved August 15, 1894, the act of adoption of the Chickasaw legislature above quoted was approved by the United States in the following words, to wit: "That the approval of

Congress is hereby given to 'An act to adopt the negroes of the Chickasaw Nation,' and so forth, passed by the legislature of the Chickasaw Nation and approved by the governor thereof January tenth, eighteen hundred and seventy-three, particularly set forth in a letter from the Secretary of the Interior transmitting to Congress a copy of the aforesaid act, contained in House Executive Document Numbered Two hundred and seven, Forty-second Congress, third session."

And this defendant alleges that upon the approval of said act of the Chickasaw legislature by the United States said freedmen became and are citizens and members of the Chickasaw Nation by adoption, and entitled to all the rights, privileges, and immunities, including the right of suffrage, of citizens of said Chickasaw Nation, excepting only rights to share in certain property and moneys specified in said act of said legislature. And the said freedmen, upon the approval of said act of said legislature, became and are entitled to have and receive forty acres per capita of the land of said Chickasaw Nation on the same terms as the Chickasaws, to be selected on the survey of said land as provided in the third article of the treaty of 1866.

15. By the agreements between the United States and the Choctaw and Chickasaw nations, dated respectively April 23, 1897, and
40 March 21, 1902, mentioned on pages 9 to 14, inclusive, in the bill of interpleader herein, said freedmen are to receive forty acres per capita of average land of the Choctaw and Chickasaw nations, which land may be selected by each allottee so as to include his improvements, the same to be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate or allotment; and in the event that it shall be finally determined in this suit that said freedmen are not, independently of said agreements, entitled to allotments in the Choctaw and Chickasaw lands this court shall render a decree in favor of said nations according to their respective interests against the United States for the value of the lands so allotted to said freedmen, as ascertained by the appraisal thereof made by the Commission to the Five Civilized Tribes for the purpose of allotment.

16. The Chickasaw freedmen allege that since their emancipation as aforesaid they have resided in the Chickasaw Nation, but that said nation, disregarding the rights of said freedmen as free men and disregarding the laws of the United States, have at all times refused and still do refuse to give said freedmen the rights and privileges accorded to all other free persons in the said Chickasaw Nation—that is to say, said freedmen have always been and now are denied the right to attend the public schools of said nation or to receive any education or instruction in the schools supported by said nation because and solely on account of their color, race, and previous condition of servitude, while said schools are open to all other free persons, whether members of the nation or not.

17. Ever since their adoption, as hereinbefore set forth, said freedmen have been and are refused the rights, privileges, and immunities of citizens of the Chickasaw Nation to which they are entitled under the law. The right of suffrage has been and is refused them upon all occa-
41 sions, when other citizens of the Chickasaw nation are permitted to exercise such privilege, and said freedmen, on account of their

color, race, and previous condition of servitude, are not permitted to hold or exercise the functions and duties of any public office or place of trust in said nation; all of which said rights, and others of a public nature, are unjustly and unlawfully denied to said freedmen.

18. The said Chickasaw Nation unlawfully refuses to allow said freedmen to have and receive by allotment forty acres per capita of the lands of said Choctaw and Chickasaw nations, as provided in said act of adoption and by Article III of the treaty of 1866.

19. And this defendant alleges that, by reason of its refusal to recognize and its denial of the rights of this defendant, above set forth, the Chickasaw Nation ought not to have or receive from the United States any part of the moneys held by the United States under the terms set forth in Article III of the treaty of 1866; but that said moneys and the interest thereon should be held, administered, and paid to this defendant by the United States.

20. By virtue of the provisions in section 36 of said act "to ratify and confirm an agreement with the Choctaw and Chickasaw tribes of Indians, and for other purposes," approved July 1, 1902, authority is conferred upon this honorable court to determine the existing controversy respecting the relations of the Chickasaw freedmen to the Chickasaw Nation, and the rights of such freedmen in the lands of the Choctaw and Chickasaw nations, and under any and all laws enacted by the Chickasaw legislature or by Congress subsequent to the treaty of 1866, aforesaid.

Wherefore this defendant, by said counsel, prays your honorable court:

1. That the Choctaw and Chickasaw nations, defendants herein, be required to answer this bill.

42 2. That this honorable court determine and by decree declare that by virtue of the said thirteenth amendment to the Constitution of the United States, and upon its adoption, all persons of African descent heretofore held in slavery by the Choctaw and Chickasaw nations became free, and have since been entitled to all the rights, privileges, and immunities of free men within the United States, and that all discrimination against them by said Chickasaw Nation, on account of their color, race, and previous condition of servitude, is and has been unlawful and contrary to the laws of the United States.

3. That by virtue of said act of the legislature of the Chickasaw Nation, in force January 10, 1873, and approved by Congress August 15, 1894, said freedmen of the Chickasaw Nation were adopted, and on the date last aforesaid that said freedmen became citizens and members of the Chickasaw Nation, entitled to all the rights, privileges, and immunities, including the right of suffrage, possessed by members of the Chickasaw Nation, upon the limitations only that they should not share in the proportional part of the Chickasaw Nation in the three hundred thousand dollars specified in Article III of the treaty of 1866, with the accrued interest thereon, nor in any benefit from the principal and interest on the invested funds or claims arising therefrom, or any part of the common domain or profits arising therefrom, excepting forty acres per capita, provided for in the third article of the treaty of 1866, and that said Chickasaw Nation may be directed by this honorable court to permit said freedmen to have and enjoy and exercise said rights and privileges of citizenship, including the right of suffrage, in said Chickasaw Nation.

4. That this honorable court further find and decree that said freedmen are entitled to forty acres of average land per capita of the lands belonging to said Choctaw and Chickasaw nations, as provided
43 in Article III of the treaty of 1866, the same to be allotted to them in accordance with the provision of the treaties and acts of Congress hereinabove referred to.

5. That out of the moneys held by the United States on account of the said leased district there be paid to, or applied for the use of, said freedmen a proper and reasonable amount for the maintenance of schools for their use and education, they having been unjustly and unlawfully deprived of school privileges by said Chickasaw Nation since they became free men.

6. That as alternative relief, in the event that the court shall find that said freedmen are not entitled to the relief above prayed for, said freedmen pray that they may have allotted to them forty acres of the average land per capita of the land of said nations, together with their improvements thereon, in accordance with, and upon the terms specified in, said act of Congress to "ratify and confirm an agreement with the Choctaw and Chickasaw tribes of Indians, and for other purposes," approved July 1, 1902.

7. And as further alternative relief, in the event said court shall find that said freedmen were not adopted, that it be decreed that said Chickasaw Nation is not entitled to have and receive their proportionate share of said three hundred thousand dollars held by the United States on account of the leased district, but that said proportionate amount shall be paid to, or applied to the use of, said freedmen by the United States.

8. And that this defendant may have such other and further relief in the premises as to this honorable court shall seem meet and the nature of the case may require.

As in duty bound, this defendant will ever pray, etc.

THE CHICKASAW FREEDMEN,
By CHARLES W. NEEDHAM,
Special Counsel.

45 IV. *Motion of Choctaw and Chickasaw Nations, defendants, to strike out certain parts of the answer of the Chickasaw Freedmen.*

(Filed February 28, 1903.)

Come now the Choctaw Nation and the Chickasaw Nation, impleaded herein as parties defendant, by their attorneys of record, and move the court to strike out paragraph 16 of the answer filed herein on behalf of the Chickasaw Freedmen, as well, also, to strike out paragraph 5 of the prayers contained in said answer, and, for grounds of motion, say:

That the several matters and things therein set forth and contained are not embraced in the subject-matter in respect of which jurisdiction was conferred upon this court, and upon the Supreme Court of the United States on appeal, by virtue of the act of the Congress of the United States approved July 1, 1902, and that said matters and things are immaterial

and irrelevant to the determination of any or either of the questions so embraced in said jurisdictional act.

MANSFIELD, McMURRAY AND CORNISH,
Attorneys for the Choctaw Nation and the Chickasaw Nation.

A. A. HOEHLING, Jr.,
Of Counsel.

WASHINGTON, D. C., *February 27, 1903.*

47 V. *Opinion and decree of the court.*

(Filed April 27, 1903.)

WRIGHT, J., delivered the opinion of the court.

This is a bill of interpleader in equity by the United States, complainant, and the Choctaw and Chickasaw nations and the Chickasaw freedmen, defendants.

For a number of years prior to the year 1866 there resided within the territory of the Chickasaw Nation a number of persons of African descent who were held in slavery in said nation.

The treaty between the United States and the Choctaw and Chickasaw Indians, concluded April 23, 1866, and proclaimed July 10, 1866, provided inter alia as follows:

"ARTICLE II. The Choctaws and Chickasaws hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in punishment of crime whereof the parties shall have been duly convicted, in accordance with laws applicable to all members of the particular nation, shall ever exist in said nations.

"ARTICLE III. The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98 west longitude known as the leased district, provided that the said sum shall be invested and held by the United States, at an interest not less than five per cent, in trust for the said nations, until the legislatures of the Choctaw and Chickasaw nations, respectively, shall have made such laws, rules, and regulations as may be necessary to give all the persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys, and public domain claimed by or belonging to said nations, respectively; and also to give to such persons who were residents, as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately upon the enactment of such laws,
48 rules, and regulations the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one-fourth to the latter, less such sum, at the rate of one hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred

to as within ninety days after the passage of such laws, rules, and regulations shall elect to remove and actually remove from the said nations, respectively. And should said laws, rules, and regulations not be made by the legislatures of the said nations, respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said Territory in such manner as the United States shall deem proper, the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove; those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations."

The legislature of the Chickasaw Nation has taken action at various times in regard to the said Chickasaw freedmen, as follows:

On November 9, 1866, the Chickasaw legislature passed an act declaring it to be the unanimous desire of the legislature that the United States hold the share of the Chickasaw Nation in the $300,000 stipulated for the cession of the "Leased district" for the benefit of the Chickasaw freedmen and remove them beyond the limits of the Chickasaw Nation, according to the third article of the treaty of 1866.

In 1868 similar action was taken by the Chickasaw legislature asking for the removal, by the United States, of the Chickasaw freedmen from the Chickasaw country.

The act of January 10, 1873, provided as follows:

"SECTION 1. Be it enacted by the legislature of the Chickasaw Nation, That all the negroes belonging to the Chickasaws at the time of the adoption of the treaty of Fort Smith, and living in the Chickasaw Nation at the date thereof, and their descendants, are hereby declared to be adopted in conformity with the third article of the treaty of 1866, between the Choctaws, Chickasaws, and the United States: Provided, however, That the proportional part of the three hundred thousand dollars, specified in the third article of the said treaty, with the accrued interest thereon, shall be paid to the Chickasaw Nation for its sole use and benefit: And provided further, The said adopted negroes of the Chickasaw Nation shall not participate in any part of the said proportional part of the said three hundred thousand dollars, nor be entitled to any benefit from the principal and interest on our invested funds or claims arising therefrom, nor to any part of our common domain, or the profits arising therefrom (except the forty acres per capita provided for in the third article of the treaty of eighteen hundred and sixty-six), nor to any privileges or rights not authorized by treaty stipulations: And provided further, That the said adopted negroes, upon the approval of this act, shall be subject to the jurisdiction and laws of the Chick-
49 asaw Nation, and to trial and punishment for offenses against them in every case just as if the said negroes were Chickasaws.

"SEC. 2. And be it further enacted, That this act shall be in full force and effect from and after its approval by the proper authority of the

United States; and all laws or parts of laws in conflict with this act are hereby repealed."

That act was transmitted by the governor of the Chickasaw Nation, by letter of the same date, to the President of the United States, and was submitted by the Secretary of the Interior to the Speaker of the House of Representatives on February 10, 1873, with recommendation for appropriate legislation for extending the time for the execution of the third article of the treaty. The papers were referred to the Committee on Freedmen Affairs, but no action thereon was had at that time.

The act approved October 18 provided, inter alia, as follows:

"SECTION 1. Be it resolved by the legislature of the Chickasaw Nation, That four commissioners, one from each county of the Chickasaw Nation, shall be elected by joint vote of the senate and house of representatives of the present session of the legislature to visit the capital of the Choctaw Nation, during the next regular session of the general council of said nation, with instructions to confer with commissioners on the part of the Choctaw Nation and agree upon some plan whereby the freedmen, former slaves of the Choctaws and Chickasaws, and their descendants shall be removed from and kept out of the limits of the Choctaw and Chickasaw country."

The act approved October 17, 1876 or 1877, provided, inter alia, as follows:

"SEC. 3. Be it further enacted, That the provisions contained in article 3 of the said treaty, giving the Chickasaw legislature the choice of receiving and appropriating the three hundred thousand dollars therein named for the use and benefit, or passing such laws, rules, and regulations as will give all persons of African descent certain rights and privileges, be, and it is hereby, declared to be the unanimous consent of the Chickasaw legislature that the United States shall keep and hold said sum of three hundred thousand dollars for the benefit of the said negroes, and the governor of the Chickasaw Nation is hereby requested to notify the Government of the United States that it is the wish of the legislature of the Chickasaw Nation that the Government of the United States remove the said negroes beyond the limits of the Chickasaw Nation, according to the requirements of the third article of the treaty of April 28, 1866."

The act of October 22, 1885, provided, inter alia, as follows:

"SECTION 1. Be it enacted by the legislature of the Chickasaw Nation, That the Chickasaw people hereby refuse to accept or adopt the freedmen as citizens of the Cherokee Nation upon any terms or conditions whatever, and respectfully request the governor of our nation to notify the Department at Washington of the action of the legislature in the premises.

"SEC. 2. Be it further enacted, That the governor is hereby authorized and directed to appoint two competent and discreet men of good judgment and business qualifications to visit Washington City, D. C., during the next session of Congress and memorialize that body to provide a means of removal of the freedmen from the Chickasaw Nation to the country known as Ok la ho ma, in the Indian Territory, or to make some suitable disposition of the freedmen question, so that they be not forced upon us as equal citizens of the Chickasaw Nation."

The resolution of October 4, 1887, provided, inter alia, as follows:

"And whereas the Chickasaw people have kindly and friendly feeling

toward the freedmen, their former slaves, and wishing them to receive full valuation of the places they live upon for their support, as provided for in section 4 of the treaty of 1866, do hereby agree that they shall have two years from the passage of this act to sell their improvements in the Chickasaw Nation to the best advantage, that no loss may accrue to them: Therefore,

"Be it resolved by the legislature of the Chickasaw Nation, That the nation shall refund to the United States the sum of $55,000, to be used in removing the freedmen in the Chickasaw Nation to their new home, as provided under the third and fourth articles of the treaty of 1866, made between the United States and the Choctaw and Chickasaw nations of Indians." (See Sen. Ex. Doc. 166, Fiftieth Congress, first session.)

The act of Congress of August 15, 1894, section 18 (28 Stats., 336), provides as follows:

"That the approval of Congress is hereby given to 'An act to adopt the negroes of the Chickasaw Nation,' and so forth, passed by the legislature of the Chickasaw Nation and approved by the governor thereof January 10, 1873, particularly as set forth in a letter from the Secretary of the Interior transmitting to Congress a copy of the aforesaid act contained in House Executive Document Numbered Two hundred and seven, Forty-second Congress, third session."

The agreement between the United States and the Choctaw and Chickasaw tribes of Indians, dated April 23, 1897, and ratified and confirmed by the act of June 28, 1898, section 29 (30 Stats., 505), provides, inter alia, as follows:

"That all the lands within the Indian Territory belonging to the Choctaw and Chickasaw Indians shall be allotted to the members of said tribes, so as to give to each member of these tribes, so far as possible, a fair and equal share thereof, considering the character and fertility of the soil and the location and value of the lands.

"The lands allotted to the Choctaw and Chickasaw freedmen are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw and Chickasaw tribe so as to reduce the allotment to the Choctaws and Chickasaws by the value of the same.

"That the said Choctaw and Chickasaw freedmen who may be entitled to allotments of 40 acres each shall be entitled each to land equal in value to 40 acres of the average land of the two nations."

These provisions relative to the freedmen are previously qualified as to their holdings of such lands by this clause in the statute, "to be selected, held, and used by them until their rights under said treaty shall be determined, in such manner as shall hereafter be provided by act of Congress."

The agreement between the United States and the Choctaw and
51 Chickasaw nations, made the 21st day of March, 1902, ratified and confirmed by the act of July 1, 1902, chapter 1362, provides as follows:

"11. There shall be allotted to each member of the Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval by the

Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allottable land of the Choctaw and Chickasaw nations, to conform, as nearly as may be, to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements. For the purpose of making allotments and designing homesteads hereunder, the forty-acre or quarter-quarter subdivisions established by the Government survey may be dealt with as if further subdivided into four equal parts in the usual manner, thus making the smallest legal subdivision ten acres, or a quarter of a quarter of a quarter of a section.

"13. The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate or allotment.

"15. Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided."

The same agreement provides as follows:

"36. Authority is hereby conferred upon the Court of Claims to determine the existing controversy respecting the relations of the Chickasaw freedmen to the Chickasaw Nation and the rights of such freedmen in the lands of the Choctaw and Chickasaw nations under the third article of the treaty of eighteen hundred and sixty-six between the United States and the Choctaw and Chickasaw nations, and under any and all laws subsequently enacted by the Chickasaw legislature or by Congress.

"37. To that end the Attorney-General of the United States is hereby directed, on behalf of the United States, to file in said Court of Claims, within sixty days after this agreement becomes effective, a bill of interpleader against the Choctaw and Chickasaw nations and the Chickasaw freedmen, setting forth the existing controversy between the Chickasaw Nation and the Chickasaw freedmen, and praying that the defendants thereto be required to interplead and settle their respective rights in such suit."

"SECTION 40. In the meantime the Commission to the Five Civilized Tribes shall make a roll of the Chickasaw freedmen and their descendants, as provided in the Atoka agreement, and shall make allotments to them as provided in this agreement, which said allotments shall be held by the said Chickasaw freedmen, not as temporary allotments, but as final allotments, and in the event that it shall be finally determined in said suit that the Chickasaw freedmen are not, independently of this agreement, entitled to allotments in the Choctaw and Chickasaw lands, the Court of Claims shall render a decree in favor of the Choctaw
52 and Chickasaw nations according to their respective interests, and against the United States, for the value of the lands so allotted to the Chickasaw freedmen as ascertained by the appraisal thereof made by the Commission to the Five Civilized Tribes for the purpose of allotment, which decree shall take the place of the said lands and shall be in full satisfaction of all claims by the Choctaw and Chickasaw nations against the United States or the said freedmen on account of the taking of the said lands for allotment to said freedmen: Provided, That nothing contained in this paragraph shall be construed to affect or change the

existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid."

The said agreement between the United States and the Choctaws and Chickasaws was ratified and confirmed by the act of July 1, 1902, as aforesaid, and was ratified in accordance with the provisions of paragraphs 73 and 74 of said agreement, by elections held on September 25, 1902, and was effective on and after that date.

The defendants answered the bill, and the hearing by the court was upon the bill and answers. The facts of the bill having been, in effect, admitted by the answers, no finding of facts appear to be necessary, other than as recited in the decree to be entered herein.

The facts, treaties, and legislation upon which the proceedings are based are shown in the preceding statement, according to the averments of the bill of complaint filed herein, and which the court has found to be true.

It only remains for the court to declare the proper legal conclusions and to state our reasons for the same. By the thirteenth amendment to the Constitution, and from the date of its proclaimed ratification, December 18, 1865, the existence of slavery was impossible within the United States or any place subject to their jurisdiction, and by the force of that instrument the slaves of the Chickasaw Nation became free, and thereafter possessed the same rights incident to all other freedmen relative to life, liberty, and property. These former slaves did not become members of the nation, nor entitled to share in the property held in common by members thereof. The treaty of July 10, 1866, we think, recognized this principle and by its terms provided a means whereby the freedmen might, by consent of the tribe and the voluntary action of the former slaves, become members and be entitled to rights in the property of the nation; namely, first, by the enacting by the nation of laws, rules, and regulations for that purpose, and, second, the acceptance thereof by the freedmen, to be manifested by the act of remaining with the nation ninety days after the adoption of such laws, rules, and regulations; or, alternately stated, by not electing to remove and actually removing from the nation within such ninety days.

The treaty permitted such action on the part of the nation to be made within two years from the ratification of the treaty, which was not done, but later, January 10, 1873, such action was taken, to take effect only after its approval by the proper authority of the United States, and which was properly submitted to Congress for that purpose, and for the further purpose of an extension of time in which to execute the provisions of such treaty. Congress took no action until August 15, 1894,
53 when it approved the act of the Chickasaw Nation to adopt the negroes, but not before the Chickasaw legislature had, in effect, repealed its act of adoption, and thereby, and otherwise, withdrew it from the further consideration of Congress. When Congress professed to act upon the proposition of the Chickasaw Nation to adopt its former slaves there was nothing upon which that act could take effect, for that proposition had been withdrawn, and the act was ineffective and without force. The question of the power of Congress of its own motion to create the freedmen members of the nation is not before us, for Congress did not assume the exercise of such authority.

There is apparent reason to say that by the agreement and act of June 28, 1898 (30 Stat. L., 506), the previous act of Congress, by which the act of adoption was approved, was ratified by the Chickasaw Nation, wherein it is provided that the Commission shall make a correct roll of the freedmen entitled to any rights under the treaty in question, and that 40 acres of land, including their present residences and improvements, shall be allotted to each of them, and such lands so allotted to the freedmen to be deducted, so as to reduce the allotment to the Indians by the value of the same. This allotment to the freedmen is, however, qualified by the further provision that the lands so allotted shall be held and used by the freedmen until their rights under the treaty shall be determined in such manner as shall thereafter be provided by Congress. This provision could not refer to anything but the then existing and now present controversy, and was a direct recognition by Congress of the denial of the rights of the freedmen to the lands then proposed to be allotted to them and an express saving of the rights of the Chickasaw defendant to insist upon its present contention in that respect, and by the act of March, 1902, Congress did provide for the determination of the rights of the freedmen under the treaty, as portended in the act of June 28, 1898. It follows, therefore, that the rights of the parties under article three of the treaty of July 10, 1866, remain unaffected by subsequent legislation, either of the Chickasaw Nation or Congress, and the relations of the Chickasaw freedmen to the Chickasaw Nation and the rights of such freedmen in the lands of the Choctaw and Chickasaw nations under the third article of the treaty in question are to be determined and declared according to its terms.

By that article of the treaty the Indian nations for $300,000 cede to the United States the territory called the leased district, the money to be invested and held by the United States, at interest not less than 5 per cent, in trust for the nations until (1) they shall have made such laws, rules, and regulations as may be necessary to give their former slaves and their descendants the rights, privileges, and immunities of citizens of the nations, except annuities, moneys, and public domain claimed by or belonging to the nations, and (2) to give to each of them 40 acres of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said lands after the Indians have made their selections. Immediately upon such adoption of the freedmen the $300,000 should be paid to the Choctaw and Chickasaw nations in proportion of three-fourths to the former and one-fourth to the latter, less such sum, at the rate of $100 per capita, as shall be sufficient to pay such of the former slaves who, within ninety days after their adoption, shall elect to and actually remove from the nations. Should such adoption not be made by the nations within two years from the ratifi-
54 cation of the treaty, the money shall cease to be held in trust by the Indians, and thereafter be held for the use and benefit of such of the former slaves as shall remove from the territory in such manner as the United States shall deem proper, the latter agreeing within ninety days from the expiration of said two years to remove from the nations all negroes as might be willing to remove, those remaining or returning to have no benefit of the money, but to be upon the same footing as other citizens of the United States in said nations. The provisions of article four of the treaty, set forth in the bill, relative to certain

concessions to the freedmen, in so far as they enlarge the rights of citizens of the United States in the nation, were intended as temporary, to exist only while the provisions of article three remained in fieri.

The Chickasaws have not, as has already been stated, adopted the freedmen into their nation. The negroes have remained in the nation. It does not appear they, or any of them, were willing to remove from the nation, and the United States, not having obligated itself to do so, was under no duty to remove them without their consent. We must presume the freedmen voluntarily remained, and still so remain, in the nations. Their status is, therefore, plainly defined by the treaty itself. Their relation to the Chickasaw Nation is, as the treaty expresses, the same as citizens of the United States in the nation, and, that being true, they have no right or interest, under the terms of the treaty, independently of the agreement of March 21, 1902, in any of the property held in common by the members of the nation. Neither are those of the freedmen who remain within the nation entitled to any part of the funds in the control of the United States.

The decree of the court will be entered in conformity to the views we have expressed, to the effect that the Chickasaw freedmen are not entitled, independently of the agreement of March 21, 1902, to allotments in the lands of the Chickasaw Nation.

DECREE OF THE COURT.

This cause coming on to be heard upon the bill of complaint of the complainant and the several answers of the respective defendants, and the court having heard the arguments of counsel of the respective parties interested herein, and thereafter having taken the said cause under advisement, and upon due consideration thereof, being now fully advised in the premises, and of and concerning the matters in controversy, doth find that the third article of the treaty of July 10, 1866, between the United States and the Choctaw and Chickasaw nations doth and hath remained wholly unaffected by any and all laws subsequently thereto enacted by the Chickasaw legislature or by Congress, independently of the agreement between the United States and the Choctaw and Chickasaw nations made March 2, 1902, ratified and confirmed by Congress July 1, 1902; that the Chickasaw Nation has not made, put in force, or given effect to any laws, rules, or regulations necessary to give all or any persons of African descent, resident in the said nation at the date of the treaty of Fort Smith, and their descendants, theretofore held in slavery in said nation, all or any the rights, privileges, and immunities, including the right of suffrage, of citizens of said nation, nor to give to such persons who were so residents as aforesaid 40 acres each of the land of said nation on the same terms, or otherwise, as the Choctaws and Chickasaws. And the court further finds that the said persons
55 of African descent did not, nor any of them, elect to remove or remove, nor were they or any of them willing to remove from said nation, but they did and do now remain therein; that the United States did not agree to remove the said African persons, nor any of them, save only upon the condition that they were willing to be removed from said nation.

The court further finds that by the said act of electing to and remaining in the said nation the said persons of African descent forfeited all benefit to the money in said third article of said treaty mentioned, and thereafter they became in said nation upon the same footing as other citizens of the United States in said nation, and were entitled only to the rights and privileges of such citizens, and were not entitled to the 40 acres of land mentioned and described in the said third article of the said treaty of July 10, 1866.

It is therefore ordered, adjudged, decreed, and declared by the court that, under and by virtue of the third article of the said treaty of July 10, 1866, independently of the agreement made March 2, 1902, and ratified and confirmed July 1, 1902, the relations of the said Chickasaw Freedmen to the Chickasaw Nation are that of citizens of the United States residing in the said nation, and that the said Chickasaw Freedmen, under the said article of the said treaty, independently of the agreement and act aforesaid of 1902, have no rights in the lands of the Chickasaw Nation, nor are they, or any of them, under said article, entitled to allotments in the lands of the said Chickasaw Nation.

And it is further ordered that upon the coming in of the roll and appraisal to be made by the Dawes Commission, as referred to in the said statute, the defendants, the Choctaw and Chickasaw nations, have leave to apply for an additional decree to be entered at the foot of this decree determining the amount which shall be paid and allowed by the United States to the said Choctaw and Chickasaw nations, as directed by said statute; and that the complainant, the United States, be at the same time heard in regard to such amount for which judgment shall be rendered against the United States.

BY THE COURT.

Filed April 27, 1903.

57 VI. *Application of the United States for and allowance of appeal.*

THE UNITED STATES, COMPLAINANTS,
vs.
THE CHOCTAW NATION AND THE CHICKASAW Nation and The Chickasaw Freedmen, defendants. } No. 23115.

From the decree rendered in the above-entitled cause on the 27th day of April, 1903, the complainants, The United States, by their Attorney-General, on the 1st day of June, 1903, make application for, and give notice of, an appeal to the Supreme Court of the United States.

LOUIS A. PRADT,
Assistant Attorney-General.

Filed June 1, 1903.

JUNE 1, 1903.

Ordered: That the foregoing application for appeal be allowed as prayed for.

BY THE COURT.

59 VII. *Application of the Chickasaw Freedmen for and allowance of appeal.*

THE UNITED STATES, COMPLAINANTS,
vs.
THE CHOCTAW NATION AND THE CHICKASAW Nation and The Chickasaw Freedmen, defendants. } No. 23115.

From the decree entered in the above-entitled cause on the 27th day of April, 1903, the defendant, The Chickasaw Freedmen, by their said attorney, on the 1st day of June, 1903, make application for, and give notice of, an appeal to the Supreme Court of the United States.

CHARLES W. NEEDHAM,
Atty. for the Chickasaw Freedmen.

Filed June 1, 1903.

JUNE 1, 1903.

Ordered: That the foregoing application for appeal be allowed as prayed for.

BY THE COURT.

61 Court of Claims.

THE UNITED STATES, COMPLAINANTS,
v.
THE CHOCTAW NATION AND THE CHICKASAW Nation and The Chickasaw Freedmen, defendants. } No. 23115.

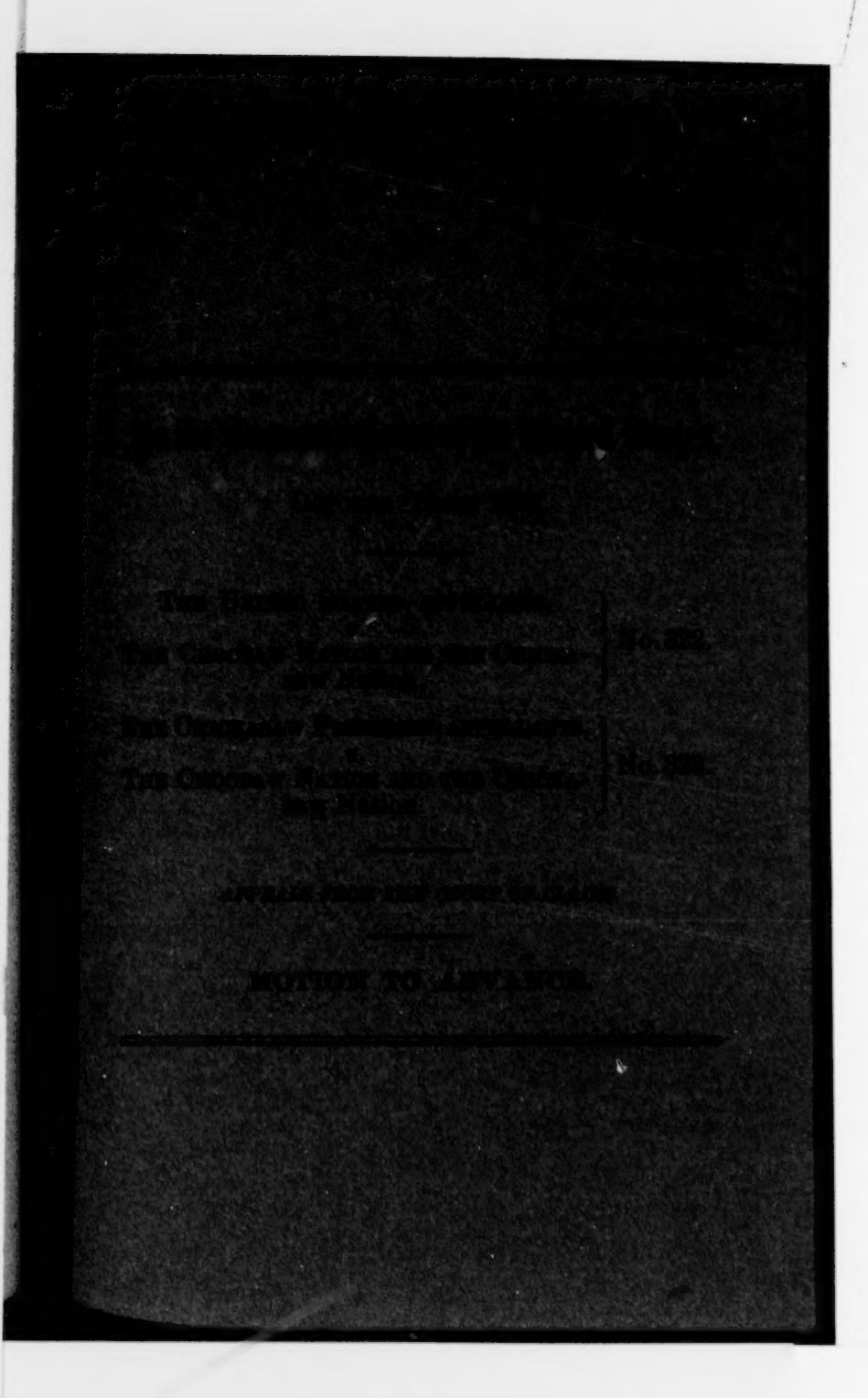
I, John Randolph, assistant clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the bill of interpleader of the complainants, of the answers of the defendants, of the opinion and decree of the court, of the application for and allowance of appeal of the United States to the Supreme Court of the United States, and of the application for and allowance of appeal of the Chickasaw Freedmen to the said Supreme Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 6th day of June, A. D. 1903.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) File No. 18973. Court of Claims. Term No. 322. The United States, appellant, *vs.* The Choctaw Nation and The Chickasaw Nation. File No. 18974. Term No. 323. The Chickasaw Freedmen, appellants, vs. The Choctaw Nation and The Chickasaw Nation. Filed June 17", 1903. Office of the clerk Supreme Court U. S. Received Jun. 13, 1903.



In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES, APPELLANT,
v.
THE CHOCTAW NATION AND THE CHICKASAW NATION. } No. 322.

THE CHICKASAW FREEDMEN, APPELLANTS,
v.
THE CHOCTAW NATION AND THE CHICKASAW NATION. } No. 323.

APPEALS FROM THE COURT OF CLAIMS.

MOTION TO ADVANCE.

The Solicitor-General, on behalf of the United States, respectfully moves the court to advance the above-entitled cases for hearing at the present term of the court, the record in said two cases (consolidated) being printed; and, for grounds of motion, respectfully assigns the following:

1. By act of Congress, approved July 1, 1902 (32 Stat., Pt. 1, p. 641), jurisdiction was conferred upon the Court of Claims, and upon this court on appeal, to determine the "existing controversy

respecting the relations of the Chickasaw freedmen to the Chickasaw Nation, and the rights of such freedmen in the lands of the Choctaw and Chickasaw nations;" as well also the question of liability, if any, of the United States to pay to said two nations "the value of the lands * * * allotted to" said freedmen "as ascertained by the appraisal thereof made by the Commission to the Five Civilized Tribes for the purpose of allotment."

2. Said act further provided:

> Any party feeling aggrieved at the decree of the Court of Claims, or any part thereof, may, within sixty days after the rendition thereof, appeal to the Supreme Court, and in each of said courts the suit shall be advanced for hearing and decision at the earliest practicable time.

3. The Court of Claims decided that the Chickasaw freedmen are not citizens of the Chickasaw Nation by adoption or otherwise; that they have no rights in the lands of the Choctaw and Chickasaw nations; and that the United States is liable to pay to said two nations the value of the lands so allotted to said freedmen by the Commission to the Five Civilized Tribes.

4. Said questions are of public and governmental interest and concern, involving, as above shown, the *status* of said freedmen, as well, also, the liability of the United States to pay a very considerable sum of money in connection with the allotment of lands to the freedmen now being

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made by the said Commission, whose work can not be concluded until this cause is determined.

The Solicitor-General further shows that all parties hereto, appellant and appellee, unite in this request for the advancement of said causes; and respectfully suggests to the court that the same may be assigned for hearing on or about Monday, January 25, 1904.

HENRY M. HOYT,
Solicitor-General.

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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 322.

THE UNITED STATES, APPELLANT,

vs.

THE CHOCTAW NATION AND THE CHICKASAW NATION.

No. 323.

THE CHICKASAW FREEDMEN, APPELLANTS,

vs.

THE CHOCTAW NATION AND THE CHICKASAW NATION.

BRIEF FOR THE UNITED STATES AND THE CHICKASAW FREEDMEN, APPELLANTS.

This is an equitable proceeding brought in the Court of Claims by the United States under an agreement, approved by act of Congress July 1, 1902 (32 Stat., 649), to determine the relations of the Chickasaw Freedmen to the Chickasaw Nation and the rights of such freedmen, and also to determine the liability, if any, of the United States to pay for

lands allotted to the Chickasaw Freedmen in the territory owned by the Choctaw and the Chickasaw Nations and occupied by the Chickasaw Nation.

If the Chickasaw Freedmen have been adopted either by the voluntary act of the Chickasaw Nation or by the act of Congress, then the Chickasaw Freedmen have certain political rights in the Chickasaw Nation and are each entitled, without payment by the United States, to forty acres of land in the Choctaw-Chickasaw territory. If they have not been adopted, then it becomes the duty of the United States to pay the Choctaw and Chickasaw Nations for these lands at the price fixed by the Dawes Commission. There are about nine thousand of these freedmen. The freedmen's interest in this controversy is their political rights. The interest of the United States is the payment of the money involved, amounting to something over one million of dollars.

I.

STATEMENT OF FACTS.

1. By a treaty entered into January 17, 1837, the Chickasaw Nation or tribe of Indians became possessed of an undivided interest in the lands of the Choctaw Nation. These lands, by the treaty of June 22, 1855, the United States guaranteed "to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common." By the same treaty, the political connection that had theretofore existed between the Choctaws and Chickasaws was severed, and in accordance with the terms of said treaty, the Indians comprising the Chickasaw Nation formed a separate government, adopting a written constitution, by whose terms certain powers were bestowed upon its legislative body.

Prior to the Civil War certain people of African descent were held in slavery by the Indian nations constituting

what is known as the Five Civilized Tribes. At the outbreak of the Civil War these nations or tribes of Indians, disregarding their treaty relations with the United States, joined the Confederacy, entered into treaty relations with the same, and took up arms against the United States. These acts abrogated all treaties with the United States, forfeited all rights held thereunder, and the tribes became the enemies of the United States.

On the twenty-second day of September, 1862, the President of the United States issued a preliminary proclamation announcing that, in the event the war continued, all slaves would be freed as a war measure; on the first day of January, 1863, pursuant thereto, the President declared all slaves within a certain specified territory free. This action by the President was carried into full effect throughout the entire territory of the United States by the adoption of the thirteenth amendment to the Constitution, December 18, 1365.

2. On the tenth day of September, 1865, commissioners designated by the President of the United States, and persons representing the Five Civilized Tribes of Indians entered into a preliminary and general treaty known as the Treaty of Fort Smith, which recites the fact that these tribes forfeited all their rights by joining the Confederacy and expresses the desire of all parties that the relations between them and the United States be reinstated; the several tribes renew their allegiance to the United States and agree "that hereafter they will in all things recognize the Government of the United States as exercising exclusive jurisdiction over them."

In the subsequent treaties made with the said Indian tribes it was the policy of the United States to provide for the freedmen by securing their adoption as members of the tribes or nations. Separate treaties were entered into be-

tween the United States and the several nations constituting the Five Civilized Tribes, by the terms of each of which, save the treaty with the Choctaw and Chickasaw Nations hereinafter referred to, the ex-slaves or freedmen of these nations were adopted as members of the nations or tribes upon a political equality with the native-born members thereof.

3. April 28, 1866, a treaty was entered into between the United States and the Choctaw and Chickasaw Indians, by the terms of which treaty said tribes might within two years adopt their freedmen, and in consideration of such adoption receive certain moneys specified in the treaty. In the event of a failure of said tribes to adopt said freedmen provision was made that the United States might remove said freedmen willing to remove, within ninety days after the expiration of said period, in which event the moneys above referred to should be held in trust by the United States for said freedmen. During the said period of two years neither of said nations adopted its freedmen and the United States has not removed or attempted to remove said freedmen from the territory occupied by said tribes, but has permitted them to occupy and improve parcels of land within the territory of said tribes in accordance with the treaty of 1866, and has now provided for their permanent location there and is allotting them lands within the territory. Said freedmen have been denied and are still denied all political and educational privileges, and the provision in Article IV of the treaty of 1866 that "all laws shall be equal in their operation upon Choctaws, Chickasaws and negroes" has not been observed by the Chickasaw Nation.

4. In order to carry out the terms of the treaty of 1866,—that is, to bestow constitutional authority upon its legislature to adopt the freedmen in accordance with Article III of said treaty,—a new constitution was adopted by the Chickasaw Nation in 1867, which has been in full force and effect from

that day to this. In all matters within the jurisdiction of the nation neither the constitution of the nation nor the provisions of the treaty of 1866 require the approval of the United States to legalize enactments of the Chickasaw legislature relating to domestic affairs.

By an act of the Chickasaw legislature approved January 10, 1873, the Chickasaw Freedmen were adopted as members of the nation or tribe subject to the conditions contained in Article III of the treaty of 1866. This act by its terms was to take effect "after its approval by the proper authority of the United States." The act of adoption was complete in terms, but its operation was suspended until it should be approved by the United States.

5. On May 17, 1882, Congress appropriated ten thousand dollars out of the trust fund created by the third article of the treaty of 1866, for the purpose of educating freedmen in said tribes, to be expended under the direction of the Secretary of the Interior, one-fourth of this sum to be used for the Chickasaw Freedmen; said act providing that either of said tribes may, before such expenditure, adopt and provide for the freedmen in said tribes in accordance with said third article. While this act of Congress did not in express terms refer to the act of adoption passed by the Chickasaw legislature, it in effect approved said act. This approval being questioned, however, Congress, by an act approved August 15, 1894, in express terms approved and gave full force and effect to the Chickasaw act of adoption of 1873 (28 Stat., 336, sec. 18).

In the interim the Chickasaw legislature had passed some resolutions and also an act expressing a desire that their freedmen be removed from the Chickasaw country. These legislative enactments, however, did not mention the act of

adoption, nor did they expressly repeal said act. These acts will be referred to later.

6. By an act of the Choctaw council, approved May 21, 1883, it was among other things provided "that all persons of African descent resident in the Choctaw Nation at the date of the treaty of Fort Smith, September 13, 1865, and their descendants, formerly held in slavery by the Choctaws or Chickasaws are hereby declared to be entitled to, and vested with, all the rights, privileges, and immunities, including the right of suffrage, of citizens of the Choctaw Nation, except in the annuities, moneys, and public domain of the nation." (Report of Com. of Ind. Affairs, 1884, p. XXXVII.)

By the third article of the treaty of 1866 it is provided that freedmen and their descendants shall have forty acres each of the land of said nation on the same terms as the Choctaws and Chickasaws.

7. The rights of freedmen under the treaty of 1866 and the several acts of Congress and the Chickasaw legislature being denied and refused them by the Chickasaw Nation, Congress conferred upon the Court of Claims, by an act approved July 1, 1902 (32 Stat., 649) jurisdiction and power "to determine the existing controversy respecting the relations of the Chickasaw Freedmen to the Chickasaw Nation and the rights of such freedmen in the lands of the Choctaw and Chickasaw Nations under the third article of the treaty of one thousand eight hundred and sixty-six, between the United States and the Choctaw and Chickasaw Nations, and under any and all laws subsequently enacted by the Chickasaw legislature or by Congress. * * * And any party feeling aggrieved at the decree of the Court of Claims * * * may * * * appeal to the Supreme Court." This act also provides for the allotment of the lands of the Choctaw and Chickasaw Nations, giving to the Chickasaw

Freedmen forty acres of average land *per capita*, and leaves to the Court of Claims the determination whether or not these lands should be paid for by the United States.

8. In 1865 at the conclusion of the war it is estimated that there were about 3,000 persons of African descent who had formerly been slaves in the Chickasaw Nation. The survivors of these, together with their descendants, number about 9,066, according to the Twelfth Census of the United States, and these people constitute the defendant in this suit designated as the Chickasaw Freedmen.

The facts bearing upon the issues in this case are set forth in the treaty of 1866, the subsequent legislation of the Chickasaw Nation and the several acts of Congress relating thereto, and by agreement the case was submitted thereon. The Court of Claims decided the case against the United States and the freedmen and both parties appealed to this court.

II.

QUESTIONS SUBMITTED TO THE COURT.

1. The status of the freedmen under the laws and treaty of 1866.

2. Have said freedmen been adopted by the voluntary act of the Chickasaw Nation?

3. Was adoption effected by act of Congress?

4. If they have been adopted into the Chickasaw Nation, what are their rights in lands and property?

5. If they have not been adopted, what are their rights, if any, to the moneys held in trust by the United States under the third article of the treaty of 1866?

III.

THE STATUS OF THE FREEDMEN.

The act of Congress under which this suit is brought directs (section 36) that the Court of Claims determine "the *relations* of the Chickasaw Freedmen to the Chickasaw Nation *and the rights of such freedmen*," etc., etc. To determine the relations of the freedmen to the Chickasaw Nation involves necessarily a discussion and a determination of their status: if they have not been adopted, what are their relations and rights as free men living under a treaty among these Indians; if they have been adopted, then what are their relations and rights as adopted citizens under the treaty and laws. We shall first discuss, under two heads, their status as free men.

1. When and how did they become free?

They did not become free by any act of the legislature of the Chickasaw Nation. The constitution of that nation prior to August 16, 1867, provides:

"The Legislature of this Nation shall have no power to pass laws for the emancipation of slaves without the consent of their owners, nor without paying their owners previous to such emancipation a full equivalent in money for the slaves so emancipated." (Constitution, Laws and Treaties of the Chickasaws, 1860, p. 22.)

Prior to the adoption of the constitution in 1867, which removed this limitation upon the power of the legislature, the freedom of slaves was recognized by the tribe in the treaty of 1866. The treaty did not emancipate them and no act of the legislature after that date undertook to give them freedom. We must look, therefore, to another source.

By the treaty of Fort Smith, entered into September 10, 1865, the Chickasaw Nation, with others, "covenant and

agree that hereafter they will in all things recognize the Government of the United States as exercising exclusive jurisdiction over them." (See pp. 16 and 17 of the Record or Rep. of Com. of Ind. Affairs, 1865.) This was but a declaration of the allegiance that was acknowledged long before the war. The Chickasaws have ever been recognized as a dependent nation living within the territory of the United States and under its general jurisdiction.

In Cherokee Nation *vs.* Southern Kansas R'y Company, 135 U. S., 641, 653, this court discussing the status of the Cherokees, one of the Five Civilized Tribes, says:

"From the beginning of the government to the present time, they have been treated as 'wards of the nation,' 'in a state of pupilage,' 'dependent political communities,' holding such relations to the general government that they and their country, as declared by Chief Justice Marshall in Cherokee Nation *vs.* Georgia, 5 Pet., 1, 17, 'are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility.'"

The Chickasaw Nation joined the rebellion, their interests as a slaveholding tribe being identified with the Confederacy. As a war measure President Lincoln issued his proclamation emancipating slaves within certain specified districts (not including the territory occupied by this tribe). Later was adopted the thirteenth amendment to the Constitution of the United States—in effect December 18, 1865 (after the treaty of Fort Smith), providing that: "Neither slavery nor involuntary servitude, except as a punishment for crime, * * * shall exist within the United States, *or any place subject to their jurisdiction.*" By this amendment to the Federal Constitution slavery within the Chickasaw Nation was abolished.

In United States *vs.* Payne, 8 Fed. Rep., 883, 891, the court say:

"Colored people were held in slavery in all the civilized tribes of the Indian Territory. Slavery was abolished there, as well as elsewhere in the United States, by the emancipation proclamation of the President and by the thirteenth amendment to the Constitution, adopted the thirteenth (*eighteenth*) day of December, 1865, and such abolition of slavery was recognized by these tribes in the several treaties made with them in 1866."

2. What rights as residents in the Chickasaw Nation under treaty did they possess by reason of their being free men?

It must be borne in mind that these defendants are of African descent; they are not Indians. The provision of the Federal Constitution, therefore, which excludes "Indians not taxed" from the rights of citizenship does not apply to these defendants. They were born in the United States, and subject to its general jurisdiction. They are not, and never were, the subjects of a foreign power. They were only the slaves of what was at most a dependent nation within, and subject to the jurisdiction of, the United States (Cherokee Nation *vs.* Southern Kansas Railway Co., *supra*). By the thirteenth amendment "the system of slavery of the colored race * * * was abolished, and by subsequent amendments and by the Civil Rights Act the colored race was raised into perfect equality of civil and political rights with all other persons."

Ex parte Virginia, 100 U. S., 339.
Strauder *vs.* West Virginia, 100 U. S., 303.
In re Look Tint Sing, 21 Fed. Rep., 905.
In re Sah Quah, 31 Fed. Rep., 327.

By reason of this citizenship, and also by reason of the provision in the fourth article of the treaty of 1866 "that all laws shall be equal in their operation upon Choctaws, Chickasaws and negroes, and that no distinction affecting the latter shall at any time be made," the freedmen were, and are, entitled to the rights, privileges, and immunities of citizens of the United States residing by treaty right within the boundaries of the Indian reservation. By Article IV of the treaty referred to, it is further agreed "that while the said freedmen, now in the Choctaw and Chickasaw Nations, remain in said nations, respectively, they shall be entitled to as much land as they may cultivate for the support of themselves and families, in cases where they do not support themselves and families by hiring, not interfering with existing improvements without the consent of the occupant, it being understood that in the event of the making of the laws, rules, and regulations aforesaid, the forty acres aforesaid shall stand in place of the land cultivated as last aforesaid." While Article III of this treaty provides for their adoption, and certain rights in case of adoption, and for their removal by the United States as stated, yet the language of Article IV above quoted is clear and comprehensive and fixes their rights, not during the two years' period, but for all the time that they shall "remain in said nations."

Generally speaking, then, these defendants, by reason of their status as free men and the terms of the treaty of 1866 (independently of the question of adoption), are entitled (1) to reside within the territory of the nation; (2) to occupy and cultivate lands and make improvements thereon; (3) to have all laws within the territory "equal in their operation upon Choctaws, Chickasaws and negroes," and (4) to stand upon an equality under the law with every other free man,—not including the political right of suffrage or the holding of office.

IV.

HAVE SAID FREEDMEN BEEN ADOPTED BY THE VOLUNTARY ACT OF THE CHICKASAW NATION?

1. As set forth above, the Chickasaw legislature passed an act, approved January 10, 1873, adopting the freedmen, substantially upon the terms of the treaty of 1866, which act was to take effect upon its approval by the United States.

If the freedmen had been adopted within two years after the ratification of the treaty of 1866, there could be no denial of the power of the Chickasaw legislature to adopt the ex-slaves. All parties in interest, namely, the United States and the Choctaw and Chickasaw nations, subscribed to the treaty. But as the period named in the treaty passed without any action being taken, it has been suggested that the Chickasaw legislature did not have the power to adopt the freedmen in 1873 upon the terms set forth in the act.

By Article III the nation was at liberty to adopt its freedmen or not to adopt them, as it saw fit. But if it did not adopt them during the two-year period, was it powerless to adopt them afterward? In the event of a failure to enact the proper legislation within the prescribed period, the United States agreed, within ninety days from the expiration of said two years, to remove, etc., all such persons (ex-slaves) "as may be willing to remove."

The limit of time contained in this article of the treaty is *mandatory* only as it relates to the United States, which agrees to remove the freedmen "willing to remove" within a specified time; it is purely *directory* in its application to adoption by legislative enactment on the part of the Chickasaw Nation. If the freedmen remained and the nation desired to adopt them subsequently, the only possible objectors would be the United States and the Choctaw Nation, the other parties to the treaty of 1866.

The constitution of the Chickasaw Nation, in force August 16, 1867, gives full power to its legislature to adopt the freedmen. It provides as follows:

"ARTICLE IV.—*Legislative Department.*—SEC. 25. In conformity with the treaty of April 28, 1866, the legislature shall have the power to enact any and all laws necessary to carry into effect the requirements specified in the said treaty.

"*General Provisions.*—SEC. 10. The legislature shall have power, by law, to admit or adopt, as citizens of this nation, such persons as may be acceptable to the people at large." (Constitution and Laws of the Chickasaw Nation, 1899, pp. 10 and 19.)

In denying the power of its legislature to adopt the freedmen in 1873, the Chickasaw Nation contends that the consent of the Choctaw Nation was necessary because the treaty of June 22, 1855 (11 Stat. L., 611), provides that of the lands "held in common" by the Choctaw and Chickasaw Nations "no part thereof shall ever be sold without the consent of both tribes," the Chickasaw Nation insists that the adoption of the freedmen into the tribe or nation would materially reduce the allotments of the native-born Choctaws and Chickasaws; therefore that adoption amounts to a sale of the land, and consent is necessary. This reasoning is unsound and the conclusion untenable; but if consent was necessary it would be a sufficient reply to say: (1) That such consent was given by the Choctaw Nation in the treaty of 1866; (2) that the Choctaw Nation at no time before or after the passage of the Chickasaw act of 1873 has objected to the adoption of the freedmen by the Chickasaw Nation; and (3) that the act of the Choctaw Nation adopting its own freedmen extended its operation in express terms to the Chickasaw freedmen. The two acts taken together,—the Chickasaws adopting their freedmen and the Choctaws adopting theirs, and each act referring to the treaty of 1866,—shows an agreement in reference to the matter.

The act of the Chickasaw legislature in 1873 adopting said freedmen in accordance with the terms of the treaty of 1866 was complete in itself, and a full exercise of the power possessed by that legislature. By the express terms of the act, however, it was not to become effective until approved by the proper authority of the United States. This last clause recognized the sovereignty of the United States over the nation; a sovereignty acknowledged in the treaty of Fort Smith and the treaty of 1866. The United States consented to and approved the act of adoption on May 17, 1882 (22 Stat., 72) and again August 15, 1894 (28 Stat., 336), and thus completed the agreement by all parties to the act of adoption. And thereupon the act of the Chickasaw legislature became operative and effected the adoption of the freedmen.

2. It is claimed, however, that by legislation relating to the freedmen subsequent to 1873 and prior to the approval of the act by the United States, the Chickasaw legislature repealed the act of adoption. October 17, 1876, the Chickasaw legislature passed an act ratifying the treaty of 1866, with the amendments made by the Senate of the United States, which provided, *inter alia*, as follows:

"SEC. 3. *Be it further enacted*, That the provisions contained in Article 3, of the said treaty, giving the Chickasaw legislature the choice of receiving and appropriating the three hundred thousand dollars therein named, for the use and benefit, or passing such laws, rules and regulations as will give all persons of African descent certain rights and privileges, be, and is hereby declared to be the unanimous consent of the Chickasaw legislature, that the United States shall keep and hold said sum of three hundred thousand dollars for the benefit of the said negroes, and the governor of the Chickasaw Nation is hereby requested to notify the Government of the United States that it is the wish of the legislature of the Chickasaw Nation that the Government of the United States remove the said negroes beyond the limits of the Chickasaw Nation, according to the requirements of the third article of the treaty of April 28, 1866." (Constitution and Laws of the Chickasaw Nation, 1899, p. 120.)

Other acts and resolutions, set forth on pages 11, 12 and 13 of the Record, were passed by the Chickasaw legislature. But none of these acts referred to the act of adoption of 1873, which was then a law, suspended in its operation, awaiting the approval of the United States. These acts, together with the act of adoption, placed the whole subject before the United States so that it could follow either of two courses. It could approve the act of adoption of 1873, or it could refuse to approve that act and remove the freedmen as requested by the act of 1876. The power of determining which course should be adopted rested wholly and exclusively with the United States.

An examination of the intermediate legislation of the Chickasaw Nation will show that it does not expressly refer to or repeal the act of adoption of 1873, unless it repeals it by implication.

In the case of Chew Heong *vs.* The United States, 112 U. S., 536, 549, this court says:

"The rule is well settled that repeals by implication are not favored, and are never admitted where the former can stand with the new act. *Ex parte* Yerger, 8 Wall., 85, 105. In Wood *vs.* The United States, 16 Pet., 342, 362, Mr. Justice Story, speaking for the court upon the question of the repeal of a statute by implication, said: 'That it has not been expressly or by direct terms repealed is admitted; and the question resolves itself into the narrow inquiry, whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some, or even all, of the cases provided for by it, for they may be merely affirmative, or cumulative, or auxiliary.'"

The intermediate legislation of the Chickasaw Nation did not, in a single act, expressly or by direct terms, repeal the act of adoption of 1873; therefore "the question resolves itself into the *narrow inquiry* whether it has been repealed by necessary implication."

An examination of the enactments of the Chickasaw legislature discloses either ignorance on the part of the legislature of the existence of the act of 1873 or a belief that it was inoperative. A *belief* that an act was inoperative, if shown to exist, does not constitute a repeal by implication. In the case of The United States *vs.* Claflin, 97 U. S., 546, 548, the court says:

"As a portion of the act of 1823 was carried into the Revised Statutes * * * and the second section was not, that section was covered by the repealing clause, unless it had been repealed before. But that clause indicates a belief on the part of Congress that it had been previously repealed. * * * This, however, although entitled to great respect, ought not to be considered as more than an expression of opinion or a recital of belief. It is not in the form of an enactment. It is not a declaration of congressional will. * * * *Whether a statute was repealed by a later one is a judicial, not a legislative question.*"

"It is necessary to the implication of a repeal that the objects of the two statutes are the same, in the absence of the repealing clause. If they are not, both statutes will stand, though they refer to the same subject" (Maxwell on the Interpretation of Statutes, 153).

The act of 1873 and the subsequent Chickasaw acts refer to the same *subject*, namely, the Chickasaw Freedmen. But the *object* of the act of 1873 and the *object* of each succeeding act are different. The object of the act of January 10, 1873, was to effect the adoption of the Chickasaw Freedmen in accordance with Article III of the treaty of 1866. On the other hand, the object of the subsequent enactments was to bring about, if possible, a removal of the freedmen. It remained for Congress to determine which should be done. The Chickasaw legislature could adopt the freedmen, but it could not remove them. The United States alone could do that, if the freedmen were willing to go. Under Article IV of the treaty of 1866 the Chickasaw

Nation was obliged to suffer the freedmen to occupy indefinitely lands within the Chickasaw country. In either event, considering the state of the legislation, it was solely in the power of Congress to determine whether the freedmen should be adopted or removed.

Congress deliberated upon these acts and petitions, all of which were before Congress, and approved the act of adoption, and by the agreement of 1902 the freedmen are to remain in the Chickasaw Nation and receive allotment of lands in this territory.

In Gabe Jackson *vs.* The United States, 34 Court of Claims, 441, 444, the court say:

"There was delay in all this and neglect to take advantage of technicalities; not impossibly because delay was thought to be wise and helpful under the most peculiar circumstances existing in the Indian Territory after the practical close of the war of '65. Be this as it may, one point is fixed, that in 1894 by act of the Chickasaw legislature, approved by the defendants' Congress, the freedmen became 'subject to the jurisdiction and laws of the Chickasaw Nation and to trial and punishment for offenses against them in every case as if the said negroes were Chickasaws.'"

We respectfully submit that by the act of adoption, passed by the Chickasaw legislature and approved by Congress, these freedmen were adopted.

V.

WAS ADOPTION EFFECTED BY ACT OF CONGRESS?

No matter what effect the Chickasaw legislation subsequent to 1873 and prior to 1894 had upon the act of adoption, the fact remains that Congress by the act approved August 15, 1894, gave life and vitality to the Chickasaw act of January 10, 1873. The statute of 1894 so identifies the Chickasaw act of adoption as to re-enact its provisions and

embody them in the act of Congress. In other words, by act of the Congress of the United States approved by the President August 15, 1894, the freedmen became citizens of the Chickasaw Nation and "*subject to the jurisdiction and laws of the Chickasaw Nation and to trial and punishment for offenses against them in every case just as if the said negroes were Chickasaws,*" upon the terms and conditions named in the act of 1873.

That Congress has always possessed the power to determine citizenship in any Indian nation or tribe without restrictions is decided by this court in Stephens *vs.* Cherokee Nation, 174 U. S., 445. Under this title many cases were determined that arose under the acts of Congress conferring authority upon the Dawes Commission, beginning with the act of March 3, 1893 (27 Stat., 612, 645), and ending with the act of June 28, 1898 (30 Stat., 495). The opinion of the court recites (p. 483) the act of March 3, 1871 (16 Stat., 544, 566), which, it says, "was carried forward into section 2079 of the Revised Statutes," as follows:

"SEC. 2079. No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

Notwithstanding the restrictions upon legislative action of the concluding clause of section 2079 above quoted, the court says:

"The treaties referred to in argument were all made and ratified prior to March 3, 1871, but it is 'well settled that an act of Congress may supersede a prior treaty and that any questions that may arise are beyond the sphere of judicial cognizance, and must be met by the political department of the Government.' Thomas *vs.* Gay, 169 U. S., 264, 271, and cases cited."

In other words, there are no restrictions upon future Congresses. After discussing the general powers of Congress over the affairs of Indian tribes and quoting at length from The Cherokee Nation *vs.* Southern Kansas Railway Company, the court says (p. 488):

"We repeat that in view of the paramount authority of Congress over the Indian tribes, and of the duties imposed on the Government by their condition of dependency, we cannot say that Congress could not empower the Dawes Commission to determine, in the manner provided, who were entitled to citizenship in each of the tribes. * * * We are of the opinion that the constitutionality of these acts in respect to the determination of citizenship cannot be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms."

The case just cited not only recognizes the power of Congress to determine citizenship, but it sweeps away the contention of the Chickasaw Nation in the case at bar that the consent of the Choctaws was necessary to perfect the adoption of the freedmen by the Chickasaw legislature.

In commenting upon Stephens *vs.* Cherokee Nation, above cited, this court in Cherokee Nation *vs.* Hitchcock, 187 U. S., 294, 306, says:

"That case involved the validity of the very act under consideration, and the precedent correlative legislation, wherein the United States practically assumed the full control over the Cherokees as well as the other nations constituting the Five Civilized Tribes, and took upon itself the determination of membership in the tribes for the purpose of adjusting their rights in the tribal property. The plenary power of control by Congress over the Indian tribes and its undoubted power to legislate, as it had done through the act of 1898, directly for the protection of the tribal property, was in that case reaffirmed."

The case of Lone Wolf *vs.* Hitchcock, 187 U. S., 553, presents a striking parallelism to the case at bar. The twelfth article of the Medicine Lodge treaty, negotiated in 1867 with the Kiowa and Comanche tribes of Indians, provided as follows:

"No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians occupying the same," etc.

On October 6, 1892, 456 adult male members of the confederated tribes signed, with three commissioners representing the United States, an agreement, which was in form a proposed treaty providing for a surrender to the United States of the rights of the tribes in the reservation, for allotments out of the lands to the Indians in severalty, and for other purposes. Before congressional action thereon a protest was made to Congress by 571 Indians in council assembled, who claimed that their assent to the agreement was obtained by fraudulent misrepresentation of its terms, and that the agreement was not binding upon the tribes because the necessary three-fourths of the adult male members had not assented thereto, as was required by the twelfth article of the Medicine Lodge treaty; further claim was made that the bills pending in Congress contained important modifications to the agreement which the Indians had not assented to.

The Senate called upon the Secretary of the Interior for information as to whether the signatures attached to the agreement comprised three-fourths of the adult males of the tribes, and he replied that *less* than the requisite three-fourths had signed. With this information and with the protest of the Indian tribes before it, Congress passed the act "to execute the agreement made with the Kiowa, Co-

manche, and Apache Indians in 1892." The Lone Wolf suit followed, in which this court says:

"Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and of course a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into in its behalf. But, as with treaties made with foreign nations (Chinese Exclusion Cases, 130 U. S., 581, 600), the legislative power might pass laws in conflict with treaties made with Indians.

"The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the Government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should be so. When, therefore, treaties were entered into between the United States and a tribe of Indians, it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy. * * *

"In view of the legislative power possessed by Congress over treaties with the Indians and Indian tribal property we may not specially consider the contentions pressed upon our notice that the signing by the Indians of the treaty of October 6, 1892, was obtained by fraudulent misrepresentation and concealment; that the requisite three-fourths of adult male Indians had not signed, as required by the twelfth article of the treaty of 1867, and that the treaty as signed had been amended by Congress without submitting such amendments to the action of the Indians, *since all these matters in any event, were solely within the domain of the legislative authority, and its action is conclusive upon the courts.*"

The pronouncement of this court in the Lone Wolf case fits the facts of the case at bar. The act of adoption of the Chickasaw legislature was suspended awaiting approval by Congress. Before such approval was given the Chickasaw

legislature protested against the presence of the freedmen in the Indian country and asked their removal. But Congress, with the protesting acts and resolutions before it, ratified the act of adoption, thus giving full force and effect to said act, and the freedmen became, by virtue of the act of Congress of August 15, 1894, citizens of the Chickasaw Nation.

VI.

RIGHTS OF FREEDMEN IF ADOPTED.

The treaty of 1866 provides that the freedmen, upon adoption, are to be invested with "all the rights, privileges, and immunities, including the right of suffrage, of citizens of said nations," and that they are to receive "forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections."

Article II of the Constitution of the Chickasaw Nation of 1867, Section 3, provides that:

"All free male persons of the age of nineteen years and upwards, who are by birth or *adoption* members of the Chickasaw tribe of Indians, and not otherwise disqualified, and who shall have resided six months immediately preceding any election in the Chickasaw Nation, shall be deemed qualified electors, under the authority of this Constitution." (Constitution and Laws of the Chickasaw Nation, 1899, p. 6.)

It is clear from the provisions of the treaty and of the Chickasaw constitution that the freedmen, if adopted, are entitled to exercise the right of suffrage, which has always been denied them. It is also clear that included in the "rights, privileges, and immunities * * * of citizens" of the Chickasaw Nation is the right to enjoy the educational facilities afforded by said nation. Furthermore, the

right to an allotment of forty acres each of the land of the Choctaw and Chickasaw Nations accrued to the freedmen upon adoption, without any further payment by the United States.

VII.

RIGHTS OF THE FREEDMEN IF NOT ADOPTED.

If, however, the freedmen were not adopted, and are not citizens of the Chickasaw Nation, as decided by the court below, their rights are (1) personal rights, (2) rights in land, and (3) rights in moneys held in trust by the United States.

1. The personal rights of the freedmen are guaranteed by the Constitution of the United States and by Article IV of the treaty of 1866.

2. The Atoka agreement, confirmed by act of Congress of June 28, 1898 (30 Stat. L., 505) provides that the Chickasaw Freedmen are to receive allotments of land "equal in value to forty acres of the average land of the two nations," and by the agreement approved by the act of Congress of July 1, 1902 (32 Stat. L., 649), "there shall be allotted to each * * * Chickasaw freedman * * * land equal in value to forty acres of the average allotable land of the Choctaw and Chickasaw Nations * * * which land may be selected by each allottee so as to include his improvements."

3. The right to moneys held in trust by the United States is a right that accrued to the Chickasaw freedmen by virtue of the provisions of the treaty of 1866, provided the freedmen were not adopted in accordance with the terms of said treaty. In Article III the Choctaw and Chickasaw Nations cede to the United States the leased district "in consideration of the sum of three hundred thousand dollars, * * *

provided that the said sum shall be invested and held by the United States, at an interest not less than five per cent., in trust for the said nations until the legislatures * * * shall have made such laws * * * as may be necessary to give all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, * * * all the rights * * * of citizens of said nations. * * * And should such laws * * * not be made by the legislatures * * * within two years from the ratification of the treaty, then the said sum * * * shall *cease* to be held in trust for the said Choctaw and Chickasaw Nations, and *be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said Territory*," etc.

If the Chickasaw Nation has not, in the opinion of the court, adopted the freedmen, then clearly the said nation is no longer the beneficiary of one-fourth of the trust fund of three hundred thousand dollars and interest, and the said nation should repay to the United States the sum advanced to it out of said fund under Article XLVI of the treaty of 1866, together with interest erroneously paid to said nation, amounting in all to fifty-five thousand dollars. (See Senate Ex. Doc. No. 166, 50th Congress, 1st session.)

This position is conceded by the Chickasaw Nation in several legislative enactments, notably the act of October 17, 1876, *supra*, wherein "it is hereby declared to be the unanimous consent of the Chickasaw legislature that the United States shall keep and hold said sum of three hundred thousand dollars *for the benefit of the said negroes;*" also in the memorial of October 4, 1877 (see Senate Ex. Doc. No. 166, 50th Cong., 1st sess., p. 5,), wherein it is "resolved by the legislature of the Chickasaw Nation, that the nation shall refund to the United States the sum of $55,000."

If the Chickasaw Nation is not the beneficiary who is? Certainly not the United States; for the Government is the

trustee of the fund. True, the United States agreed to remove "all such persons of African descent as may be willing to remove; those remaining or returning * * * to have no benefit of said sum." But it never undertook to remove the freedmen. They, on their part, in memorials to Congress praying for a determination of their status, expressed a willingness to be removed, provided it should be adjudged that they were not members of the Chickasaw Nation by adoption. Therefore, the beneficiary of the trust, the freedmen, have done nothing to forfeit their right to the "use and benefit" of the trust fund.

The United States, as trustee, should not apply the fund to the purchase of lands from the Chickasaws for allotment to the freedmen, now that the Government and the Chickasaws have agreed to locate the freedmen permanently in the Chickasaw country. It was never intended that this trust fund should be used to purchase lands whereon to colonize the freedmen. In the event that the Chickasaw Nation did not adopt the freedmen, the United States had a home provided for them. By the third article of the treaty of March 21, 1866 (14 Stat. L., 755), the Seminole Indians cede to the United States "their entire domain," with authority to the United States "to locate other Indians and *freedmen* thereon." Discussing this article of the treaty, Judge Parker, in the case of The United States *vs.* Payne, *supra*, says:

"What did the government mean by locating 'freedmen thereon?' * * * The government was desirous of protecting these freedmen and of securing them homes. It was not known how well the several Indian tribes who had held them in slavery would observe their pledges to secure them the same rights they enjoyed. * * * The government had given them the boon of freedom, and it was in duty bound to secure it, in all that the term implied, to them. The government feared that to do this it might be necessary to settle them in a colony by themselves. This purpose of the government, should it become necessary, was manifested by

the terms of the Choctaw treaty of April 15 (28), 1866. Therefore, in making the treaty with the Seminoles, it sought to provide a home for such freedmen as had been held in slavery by the Indians in the Indian Territory, should that necessity occur, to secure them their rights."

A home was provided for the freedmen if they were removed, and the trust fund was not, therefore, to be applied to the purchase of lands whereon to colonize them. It was to compensate them for the rights of citizenship which might be denied them by the Choctaw and Chickasaw Nations, and aid them in making homes for themselves and earning a livelihood.

The court below says (Record, p. 30):

"The negroes have remained in the nation. It does not appear they, or any of them, were willing to remove from the nation, and the United States, not having obligated itself to do so, was under no duty to remove them without their consent. We must presume the freedmen voluntarily remained, and still so remain, in the nations. Their status is, therefore, plainly defined by the treaty itself. Their relation to the Chickasaw Nation is, as the treaty expresses, the same as citizens of the United States in the nation, and, that being true, they have no right or interest, under the terms of the treaty, independently of the agreement of March 21, 1902, in any of the property held in common by the members of the nation. Neither are those of the freedmen who remain within the nation entitled to any part of the funds in the control of the United States."

It is true that the freedmen have remained in the Chickasaw country. They preferred to continue in the land of their birth or adoption. They hesitated to abandon the improvements which they or their fathers had made on land occupied since the war. They had not the means to remove and make a home elsewhere. And the United States took no action whatsoever looking toward their removal. The attitude of the freedmen was well expressed in 1888 by the

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then Commissioner of Indian Affairs. He said (Senate Ex. Doc. No. 166, 50th Congress, 1st session):

"During that year (1887) and the present, several complaints have been received from the freedmen relative to the denial of their rights, and particularly as to the utter lack of educational facilities. Recently Agent Owen held a conference with some of the leading freedmen, at which they expressed a desire to remain in the nation if their rights, especially in the matter of schools, could be accorded them, *but signified their willingness to submit to the decision of the Government.*"

The Commissioner of Indian Affairs quoted as above caused to be introduced in Congress a bill providing for the removal of the freedmen (Senate document last named), but the measure was never enacted into law.

That the freedmen have forfeited or prejudiced any of their rights under the treaty of 1866 because of indifference on their part, or because they were unwilling to remove from the Chickasaw country, is not well founded in fact. In 1866 the freedmen memorialized the United States Government, stating that the bitter feeling of the Chickasaws toward them rendered them anxious and willing to leave the nation, and to settle on any land designated by the Government, and they asked that the Government provide transportation for themselves and families, and supplies sufficient to enable them to make a start in their new homes. To this request the United States paid no heed. Two years later, in 1868, a memorial of similar purport was forwarded to Washington by the freedmen, and was laid before Congress. But no action was taken thereon. In February, 1869, a delegation of freedmen visited Washington and submitted a third memorial urging the fulfillment on the part of the Government of the stipulations in the treaty of 1866 relative to their people. From this effort nothing resulted. (See Report of Commissioner of Indian Affairs, 1887, page LIX.)

It does not follow, therefore, that the United States was relieved of its treaty obligations, and of its duty toward the freedmen, by a lack of consent on their part. There has been no failure on their part, no unwillingness to abide by the decision of the United States to remove or not to remove them. They have not forfeited their rights under the treaty of 1866, and if not adopted must be entitled to the benefit of the funds in the control of the United States as trustee. Certainly the Chickasaw Nation would not be entitled to it if there has been no adoption. The United States is a trustee and as such is not entitled to the fund. It may use the fund for the benefit of the freedmen, but, as stated, not for the purchase of land.

VIII.

GOVERNMENTAL POLICY.

In concluding this argument we desire to return to the original proposition, which seems to us the true position and one that solves all the questions involved in accordance with the well-defined policy of the United States in regard to the slaves that were freed by the emancipation proclamation and the amendment to the Constitution. Beginning with the reconstructed States of the Union and extending to the Five Civilized Tribes, the constitutions and treaties have provided for the incorporation of the ex-slave into the local government. The laws of the United States gave to the freedman citizenship and by virtue of the constitutions and treaties he became a part of the local political body in which he was born or lived at the time when he was given his freedom. If we examine the treaties with the Five Civilized Tribes we shall find that in all of them there is a provision for the adoption of the former slaves.

In the treaty with the Chickasaw Nation it was evidently felt that the holding of this trust fund of three hundred

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thousand dollars conditioned upon the adoption of the former slaves, would result in a change of the local constitutions of the tribes and legislation would follow adopting the negroes. The constitutions were changed, but the succeeding legislatures of the Chickasaw Nation varied in their wishes upon the subject of adoption, and therefore all of the legislation by that nation has not been harmonious. The policy and legislation of the United States on the contrary has been consistent, with a single purpose in view, namely, the incorporation of the freedmen into the body politic to which they naturally belonged, with all the rights, privileges, and immunities, including the right of suffrage, of other citizens of the State or nation.

Holding that the freedmen were adopted will entitle the Chickasaw Nation to receive the money held in trust by the United States, part of which it has already received as an advance, thus settling this financial question. The United States will not be required to pay for the lands allotted to the freedmen upon which these freedmen have been living since the civil war.

By the agreement of 1902 these freedmen are to remain forever in the Chickasaw Nation, they are to receive forty acres of land each, allotted to them so as to give to each the improvements which they have themselves made upon the land. It is not a question of removal. By this agreement they are to remain and the question is, what shall their status be? Shall they remain in the deplorable condition set forth in many reports of the Indian agent of that Territory, in which it is shown conclusively that they have no school privileges whatever and no political rights accorded to them? Or shall the ruling be that they have been adopted and as such have the right to secure for themselves and their children a proper education at public expense? Their property is and will be taxed for these purposes, and there is every reason, moral and political, why these freedmen, like all others in every State and dependent nation within the United States, shall have those

political rights which will assure to them the common privileges of the citizen so dear to the American people and so essential to the development of the race. The United States by its Congress has spoken clearly upon this subject. It has provided for their adoption, in pursuance of its general policy, in an act which refers expressly to the act of adoption passed by the Chickasaw legislature. These Indian nations are dependent nations owing allegiance to the United States as the sovereign nation. They cannot defeat the will of the sovereign power. We therefore submit that such construction should be given these treaties, and acts of the local legislature, and the acts of Congress as will uphold and advance the wise and humane policy of the United States.

Respectfully submitted.

LOUIS A. PRADT,
Assistant Attorney General for the United States.

CHARLES W. NEEDHAM,
Counsel for the Chickasaw Freedmen.

FILE COPY.

JAN 25 1904

JAMES H. McKENNEY, Clerk

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 322.

THE UNITED STATES, APPELLANT,

vs.

THE CHOCTAW NATION AND THE CHICKASAW NATION.

No. 323.

THE CHICKASAW FREEDMEN, APPELLANTS,

vs.

THE CHOCTAW NATION AND THE CHICKASAW NATION.

BRIEF ON BEHALF OF THE CHOCTAW NATION AND THE CHICKASAW NATION, APPELLEES.

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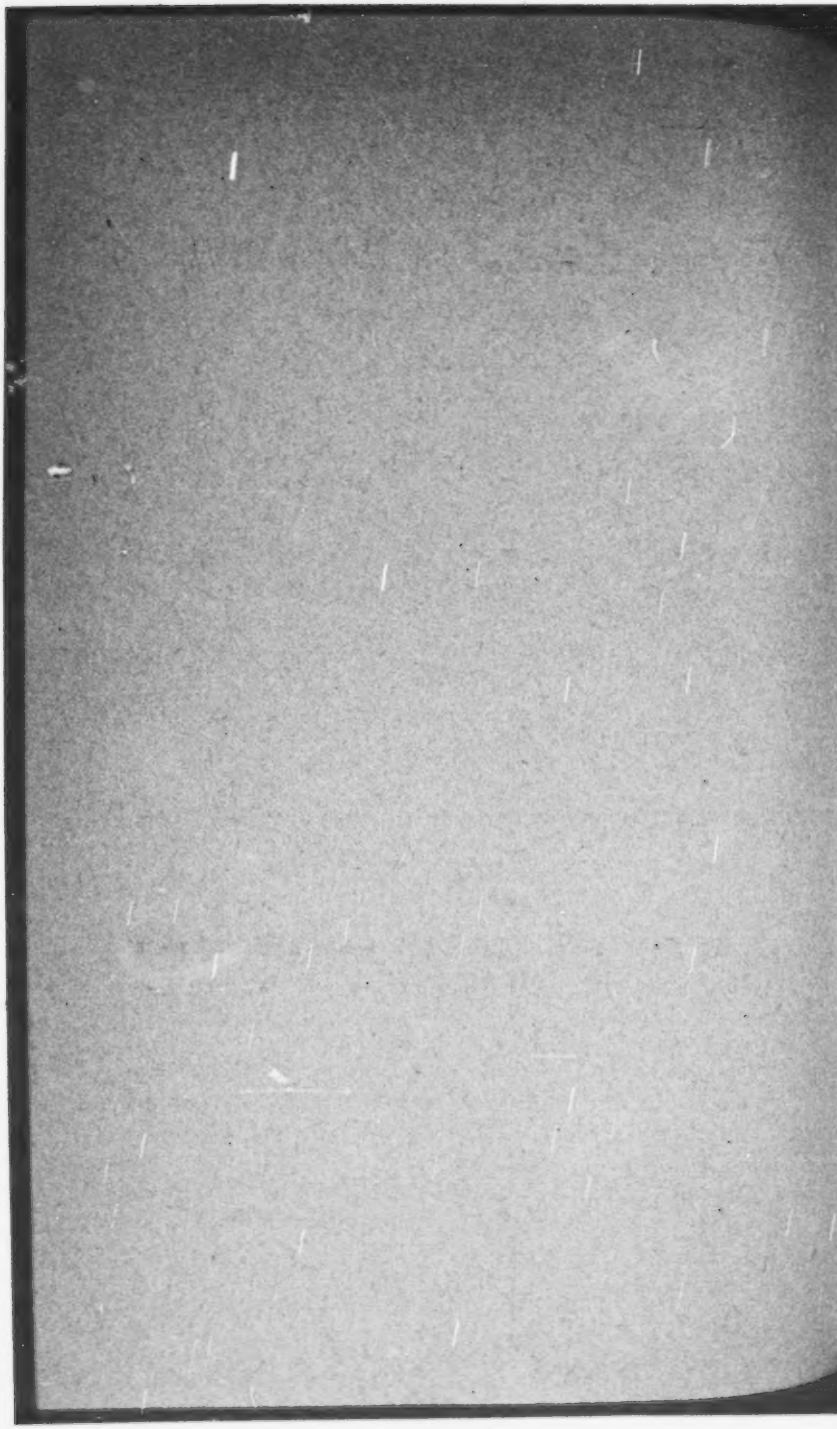

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THE UNITED STATES, APPELLANT,

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THE CHICKASAW FREEDMEN, APPELLANTS,

vs.

THE CHOCTAW NATION AND THE CHICKASAW NATION, APPELLEES.

BRIEF FOR THE CHOCTAW AND CHICKASAW NATIONS.

This is an appeal, taken by the United States and the Chickasaw Freedmen, from a decree rendered against them, in the Court of Claims of the United States, on April 27, 1903 (*R., 30–31*).

The opinion of the Court of Claims was delivered by Wright, J., and is set forth at length in the record (*pages 23–30*).

This action was commenced in the Court of Claims by a bill of interpleader filed by the United States under the following provisions of the agreement between the United States and the Choctaw and Chickasaw Nations entered into on the twenty-first day of March, 1902, and ratified and confirmed by the act of Congress approved July first, nineteen hundred and two (*32 Stats., 649*), to-wit:

> "SECTION 36. Authority is hereby conferred upon the Court of Claims to determine the existing controversy respecting the relations of the Chickasaw Freedmen to the Chickasaw Nation and the rights of such freedmen in the lands of the Choctaw and Chickasaw Nations under the third article of the treaty of eighteen hundred and sixty-six, between the United States and the Choctaw and Chickasaw Nations, and under any and all laws subsequently enacted by the Chickasaw legislature or by Congress.
>
> "SECTION 37. To that end the Attorney General of the United States is hereby directed, on behalf of the United States, to file in said Court of Claims, within sixty days after this agreement becomes effective, a bill of interpleader against the Choctaw and Chickasaw Nations and the Chickasaw Freedmen setting forth the existing controversy between the Chickasaw Nation and the Chickasaw Freedmen and praying that the defendants thereto be required to interplead and settle their respective rights in such suit.
>
> "SECTION 38. Service of process in the suit may be had on the Choctaw and Chickasaw Nations, respectively, by serving upon the principal chief of the former and the governor of the latter a certified copy of the bill, with a notice of the time for answering the same, which shall not be less than thirty nor more than sixty days after such service, and may be had upon the Chickasaw Freedmen by serving upon each of three known and recognized Chickasaw Freedmen a certified copy of the bill, with a like notice of the time for answering the same, and by publishing a notice of the commencement of the suit, setting forth the nature and prayer of the bill, with the time for answering the same, for a period of three

weeks in at least two weekly newspapers, having general circulation in the Chickasaw Nation.

"SECTION 39. The Choctaw and Chickasaw Nations, respectively, may in the manner prescribed in sections twenty-one hundred and three to twenty-one hundred and six, both inclusive of the Revised Statutes, employ counsel to represent them in such suit and protect their interest therein; and the Secretary of the Interior shall employ competent counsel to represent the Chickasaw Freedmen in said suit and protect their interests therein; and the compensation of counsel so employed for the Chickasaw Freedmen, including all costs of printing their briefs and other incidental expenses on their part, not exceeding six thousand dollars, shall be paid out of the Treasury of the United States upon certificate of the Secretary of the Interior, setting forth the employment and the terms thereof and stating that the required services have been duly rendered; and any party feeling aggrieved at the decree of the Court of Claims, or any part thereof, may, within sixty days after the rendition thereof, appeal to the Supreme Court, and in each of said courts, the suit shall be advanced for hearing and decision at the earliest practicable time.

"SECTION 40. In the meantime the Commission to the Five Civilized Tribes shall make a roll of the Chickasaw Freedmen and their descendants, as provided in the Atoka agreement, and shall make allotments to them as provided in this agreement, which said allotments shall be held by the said Chickasaw Freedmen, not as temporary allotments, but as final allotments, and in the event that it shall be finally determined in said suit that the Chickasaw Freedmen are not, independently of this agreement, entitled to allotments in the Choctaw and Chickasaw lands, the Court of Claims shall render a decree in favor of the Choctaw and Chickasaw Nations, according to their respective interests, and against the United States for the value of the lands so allotted to the Chickasaw Freedmen as ascertained by the appraisal thereof made by the Commission to the Five Civilized Tribes for the purpose of allotment which decree shall take

the place of the said lands and shall be in full satisfaction of all claims by the Choctaw and Chickasaw Nations against the United States or the said freedmen on account of the taking of the said lands for allotment to said freedmen: *Provided*, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid."

The sole question to be determined by the Court of Claims was:

> "What action has the Chickasaw Nation lawfully taken under the provisions of article three of the treaty between the United States and the Choctaw and Chickasaw Nations, concluded April 28, 1866, and proclaimed July 10, 1866, in regard to the Chickasaw Freedmen?"

Articles 2, 3, and 4 of said treaty are as follows:

"ARTICLE II.

> "The Choctaws and Chickasaws hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in punishment of crime whereof the parties shall have been duly convicted in accordance with laws applicable to all members of the particular nation shall ever exist in said nations.

"ARTICLE III.

> "The Choctaws and Chickasaws in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the ninety-eighth degree west longitude, known as the leased district, provided that the said sum shall be invested and held by the United States, at an interest not less than five per cent., in trust for the said

nations, until the legislatures of the Choctaw and Chickasaw Nations, respectively shall have made such laws, rules and regulations as may be necessary to give all persons of African descent resident in said nations at the date of the treaty of Fort Smith, and their descendants heretofore held in slavery among said nations, all the rights, privileges, and immunities, including the right of suffrage of citizens of said nations, except in the annuities, moneys, and public domain claimed by, or belonging to said nations respectively; and also to give to each such person who were residents as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land after the Choctaws and Chickasaws and Kansas Indians have made their selections, as herein provided; and immediately on the enactment of such laws, rules and regulations, the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw Nations in the proportion of three-fourths to the former and one-fourth to the latter—less such sum, at the rate of one hundred dollars *per capita* as shall be sufficient to pay such persons of African descent before referred to as within ninety days after the passage of such laws, rules and regulations shall elect to remove and actually remove from the said nations respectively. And should the said laws, rules and regulations not be made by the legislatures of the said nations respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw Nations, and be held for the use and benefit of such of said persons of African descent as the United States shall remove from the said Territory in such manner as the United States shall deem proper—the United States agreeing, within ninety days from the expiration of said two years to remove from said nations all such persons of African descent as may be willing to move; those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars

or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations.

"ARTICLE IV.

"The said nations further agree that all negroes, not otherwise disqualified or disabled, shall be competent witnesses in all civil and criminal suits and proceedings in the Choctaw and Chickasaw courts, any law to the contrary, notwithstanding, and they fully recognize the right of the freedmen to a fair remuneration on reasonable and equitable contract for their labor, which the law should aid them to enforce. And they agree, on the part of their respective nations, that all laws shall be equal in their operation upon Choctaws, Chickasaws and negroes and that no distinction affecting the latter shall at any time be made, and that they shall be treated with kindness and be protected against injury; and they further agree that while the said freedmen, now in the Choctaw and Chickasaw Nations, remain in said nations, respectively, they shall be entitled to as much land as they may cultivate for the support of themselves and families, in cases where they do not support themselves and families by hiring, not interfering with the existing improvements without the consent of the occupant, it being understood that in the event of the making of the laws, rules and regulations aforesaid, the forty acres aforesaid shall stand in place of the land cultivated as last aforesaid."

Under the foregoing articles of the treaty of 1866, the Chickasaw Nation could, at its option, within two years from July 10, 1866, through its legislature, make the "laws, rules, and regulations," provided for and receive the sum therein mentioned, or could fail or refuse to do so, in which event said sum of money was to be held in trust by the United States for

". . . such of said persons of African descent as the United States shall remove from the said ter-

> ritory in such manner as the United States shall deem proper—the United States agreeing, within ninety days from the expiration of said two years, to remove from said nations all such persons of African descent as may be willing to move, those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in said nations."

In the event the Chickasaw Nation had accepted the first alternative, then, under the law vesting the Court of Claims with jurisdiction, the Choctaw and Chickasaw Nations could not have recovered in this action.

> ". . . and in the event that it shall be finally determined in said suit that the Chickasaw Freedmen are not, independently of this agreement, entitled to allotments in the Choctaw and Chickasaw lands, the Court of Claims shall render a decree in favor of the Choctaw and Chickasaw Nations according to their respective interests and against the United States, for the value of the lands so allotted to the Chickasaw Freedmen as ascertained by the appraisal thereof made by the Commission to the Five Civilized Tribes for the purpose of allotment, which decree shall take the place of the said lands and shall be in full satisfaction of all claims by the Choctaw and Chickasaw Nations against the United States or the said freedmen on account of the taking of the said lands for allotment to said freedmen: *Provided*, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid."

The question to be determined by the Court of Claims and the extent of its jurisdiction is clearly defined by the foregoing provisions of section 40, of the act of Congress approved July 1, 1902 (32 Stats., 649).

WHAT LAWFUL ACTION WAS TAKEN BY THE LEGISLATURE OF THE CHICKASAW NATION UNDER THE PROVISIONS OF ARTICLE 3 OF THE TREATY OF 1866 IN REGARD TO CHICKASAW FREEDMEN?

An examination of article 3 of the treaty of 1866 will show clearly that the United States presented two alternatives to the Chickasaw Nation, to wit:

First. The nation might, through its legislature, within two years from July 10, 1866, make the "laws, rules, and regulations" required by the provisions of article 3, of the treaty, and receive its proportion of the sum of three hundred thousand dollars.

Second. It could fail or refuse to make such "laws, rules, and regulations" and incur the forfeiture of its proportionate share of said sum of money.

The matter was optional with the Chickasaw Nation. Which alternative did it choose?

The Chickasaw Nation had no power to take any action which would bind either of the defendant nations after July 10, 1868, under the provisions of article 3 of said treaty; and the only action taken by the legislature of the Chickasaw Nation, within two years from July 10, 1866, the date of the treaty, was by legislative act passed on November 9, 1866, as follows:

> "SECTION 1. *Be it enacted by the legislature of the Chickasaw Nation*, That whereas, a treaty was concluded at Washington city on the 28th of April, 1866, by commissioners duly appointed on the part of the Chickasaws, Choctaws and the United States Government, which said treaty was ratified with amendments by the United States Senate and confirmed by the President, the Chickasaw legislature does hereby

consent, and confirm the said treaty and amendments made by the Senate of the United States.

"SECTION 2. . . .

"SECTION 3. *Be it further enacted*, That the provisions contained in article 3d of the said treaty, giving the Chickasaw legislature the choice of receiving and appropriating the three hundred thousand dollars named for the use and benefit of the Chickasaws, or passing such laws, rules, and regulations, as will give all persons of African descent certain rights and privileges, be, and is hereby declared to be the unanimous consent of the Chickasaw legislature; that the United States shall keep and hold said sum of three hundred thousand dollars for the benefit of the said negroes. And the governor of the Chickasaw Nation is hereby requested to notify the Government of the United States that it is the wish of the legislature of the Chickasaw Nation, that the Government of the United States remove the said negroes beyond the limits of the Chickasaw Nation, according to the requirements of the 3d article of the treaty of April 28th, 1866."

This was the answer of the Chickasaw Nation to the proposition presented to them by article 3, of the treaty of July 10, 1866, and this answer was given on November 9, 1866, only four months after the date of the treaty, while the matter was fresh in the minds of the Chickasaw people. No other action was taken by either the Chickasaw Nation or the United States until July 23, 1868, thirteen days after the expiration of the two years, from July 10, 1866, when the Secretary of the Interior addressed to the President *pro tempore* of the United States Senate, an official communication which contained the following paragraph:

"Two years from the ratification of the treaty having expired, and the legislatures of the Choctaw and Chickasaw Nations having failed to make such laws, rules, and regulations in regard to said persons of African descent resident in said nations at the date of the treaty of April 28, 1866, it becomes the duty of

the United States, within ninety days from the expiration of the said two years to remove from said nations all such persons of African descent as may be willing to remove."

On the seventeenth of August, 1868, the following official communication was presented to the Commissioner of Indian Affairs by the Chickasaw commissioner and attorney general of the Choctaw Nation:

"WASHINGTON, *August* 17, 1868.

"SIR: The undersigned respectfully call your attention to the provisions contained in article 3 of the treaty made and concluded at the city of Washington on the 28th day of April, A. D. 1866, between the United States, and the Choctaw and Chickasaw Nations of Indians, and to notify you that the Choctaws and Chickasaws have not made within the two years prescribed such laws, rules and regulations as are necessary to give all persons of African descent resident in said nation at the date of the treaty of Fort Smith and their descendants heretofore held in slavery among said nations all the rights, privileges and immunities, including the right of suffrage, of citizens of said nations, respectively, and the right to forty acres of land each, to be selected and held on the same terms as the Choctaws and Chickasaws are to select and hold their lands. On the contrary, as appears by the files of your office, the legislative councils of both nations have expressed a desire that the Government of the United States shall, with the least possible delay, carry into effect the stipulations contained in said third article of said treaty in reference to the removal of said persons of African descent from the limits of the Choctaw and Chickasaw country.

"We are, sir, respectfully, your obedient servants,

"HOLMES COLBERT,
"*Chickasaw Commissioner.*
"SAMPSON FOLSOM,
"*Attorney General Choctaw Nation.*

"Hon. N. G. TAYLOR,
"*Commissioner of Indian Affairs.*"

On November 9, 1870, the governor of the Chickasaw Nation, in pursuance of the action of the legislature issued the following proclamation:

> "*Whereas*, it having become necessary, under the treaty of April 28th, 1866, that the freedmen were put upon the same footing with the other citizens of the United States, I, William P. Brown, governor of the Chickasaw Nation, do this day issue this, my proclamation, requiring all freedmen who are living within the limits of the Chickasaw Nation to obtain 'permits,' as is required by the laws of the Chickasaw Nation (of the citizens of the United States) by the first day of January A. D. 1871.
>
> "Given under my hand and seal of office this the 9th day of November, A. D. 1870.
>
> "WM. P. BROWN,
>
> "*Governor Chickasaw Nation.*"

The lands embraced within the limits of the Choctaw and Chickasaw Nations belong to the members of said tribes, the character of their holding being fixed by the following provision of article 1 of the treaty entered into on the 22d day of June, 1855, between the United States and the Choctaw and Chickasaw Nations:

> "And pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal, undivided interest in the whole: *Provided, however*, No part thereof shall ever be sold without the consent of both tribes; and that said lands shall revert to the United States if said Indians and their heirs become extinct or abandon the same."

We take it no argument is necessary to support the proposition that the Chickasaw legislature had no power after the expiration of the two years from July 10, 1866, the date of

said treaty, to take any action affecting the property of both tribes. No such authority was conferred upon the Chickasaw Nation by any act of Congress and no such power existed in it.

It is apparent from an examination of article 3 of said treaty that the nature of the holding of said lands by said tribes was recognized by them and by the United States in making said treaty. Article 3 provides that such action shall be taken by the legislatures of the Choctaw and Chickasaw Nations "respectively," and the same language is used in speaking of the alternative of said proposition. The action of the legislatures of the Choctaw and Chickasaw Nations "respectively" must have been taken within two years from the date of said treaty, or it became the duty of the United States to carry out the provisions of said article, by removing from said nations, within ninety days, all those freedmen who were willing to remove. The remainder of said freedmen, under the provisions of said article 3, then stood "upon the same footing as other citizens of the United States in the said nations."

It is a familiar principle of law that the action taken by the parties to a contract is conclusive as to what was intended to be performed. Both the Choctaw and Chickasaw Nations and the United States have so construed this article of the treaty, as will be seen by reference to the action of the tribal authorities and the Secretary of the Interior cited herein.

Not only this but Congress recognized this fact by the following provision of the act of May 17, 1882 (22 Stat. at Large, page 73), to wit:

> "That the sum of ten thousand dollars is hereby appropriated, out of the three hundred thousand dollars reserved by the third article of the treaty with the Choctaws and Chickasaws concluded April eighth, eighteen hundred and sixty-six, for the purpose of educating freedmen in said tribes, to be expended

under the direction of the Secretary of the Interior, three-fourths thereof for the freedmen among the Choctaws, and one-fourth for the freedmen among the Chickasaws: *Provided*, That said sum of ten thousand dollars shall be deducted in like proportion from any moneys in this act appropriated to be paid said Choctaws and Chickasaws: *And provided further*, That either of said tribes may, before such expenditure adopt and provide for the freedmen in said tribe in accordance with said third article, and in such case the money herein provided for such education in said tribe shall be paid over to said tribe, to be taken from the unpaid balance of the three hundred thousand dollars due said tribe."

Here following the construction of the nations and the Interior Department is a declaration by Congress, nine years after the passage of the act of January 10, 1873, by the Chickasaw legislature (which counsel for the Chickasaw Freedmen relies upon) that the freedmen have not been adopted by either of said tribes, and presenting to them another proposition for the adoption of said freedmen.

The legislature of the Choctaw Nation, shortly afterward, to wit: on May 21, 1883, passed an act under the provisions of said act of Congress of May 17, 1882 (22 Stat. at Large, pages 72 and 73), adopting their freedmen. It will be noticed that while article 3 of the treaty of 1866 provides that action should be taken by the legislatures of said nations *respectively*, the act of May 17, 1882, provides that *either* of said tribes may take such action.

We respectfully submit that this is conclusive that the act of January 10, 1873, did not have the effect of adopting the Chickasaw Freedmen, under article 3 of said treaty; but we are not forced to rely on this alone. No action was ever taken by the Chickasaw legislature to adopt said freedmen under the authority conferred by the act of May 17, 1882 (Stat. at Large, 22, pages 72 and 73).

On the contrary, as we shall presently show, the Chickasaws repeatedly took just the contrary action and urged upon the United States the removal of said freedmen.

The act of the Chickasaw legislature of January 10, 1873, is as follows:

> "SECTION 1. *Be it enacted by the legislature of the Chickasaw Nation*, That all the negroes belonging to the Chickasaws at the time of the adoption of the treaty of Fort Smith, and living in the Chickasaw Nation at the date thereof, and their descendants, are hereby declared to be adopted in conformity with the third article of the treaty of 1866 between the Choctaws, Chickasaws, and the United States: *Provided, however*, That the proportional part of the $300,000 specified in article third of said treaty, with the accrued interest thereon, shall be paid to the Chickasaw Nation for its sole use and benefit: *And provided further*, The said adopted negroes of the Chickasaw Nation shall not participate in any part of said $300,000, nor be entitled to any benefit from the principal and interest on our invested funds or claims arising therefrom, nor to any part of our common domain, or the profits arising therefrom (except the forty acres *per capita* provided for in the third article of the treaty of 1866), nor to any privileges or rights not authorized by treaty stipulations: *And provided further*, That the said adopted negroes, upon the approval of this act, shall be subject to the jurisdiction and laws of the Chickasaw Nation and to trial and punishment for offenses against them in every case just as if the said negroes were Chickasaws.
>
> "SECTION 2. *And be it further enacted*, That this act shall be in full force and effect from and after its approval by the proper authority of the United States. And all laws or parts of laws in conflict with this act are hereby repealed."

It will be observed that this act was not passed within the two years provided by the treaty and is evidently not even an attempt to comply with its requirements. It imposes

new conditions and expressly withholds the consent of the Chickasaws to others imposed by that treaty. By its terms it could have no effect until approved "by the proper authority of the United States."

This act not having been approved "by the proper authority of the United States" on October 18, 1876, the Chickasaw legislature adopted the following resolution:

> "Whereas the governor of the Chickasaw Nation has recommended to this legislature that commissioners be sent on the part of the Chickasaw Nation, to confer with commissioners on the part of the Choctaw Nation in relation to the freedmen in said nations, and to agree with the Choctaws upon some plan for the final settlement of all questions relating to said freedmen;
>
> "And whereas it is understood that the governor is in favor of the removal of all freedmen, former slaves of the Choctaws and Chickasaws, from the limits of the Choctaw and Chickasaw country, and is of the opinion that the same may be accomplished: therefore,
>
> "SECTION 1. *Be it resolved by the legislature of the Chickasaw Nation*, That four commissioners, one from each county of the Chickasaw Nation, shall be elected by joint vote of the senate and house of representatives of the present session of the legislature, to visit the capital of the Choctaw Nation during the next regular session of the general council of said nation, with instructions to confer with commissioners on the part of the Choctaw Nation, and agree upon some plan *whereby the freedmen, former slaves of the Choctaws and Chickasaws and their descendants, shall be removed from and kept out of the limits of the Choctaw and Chickasaw country.*
>
> "SECTION 2. *Be it further resolved*, That the commissioners provided for in the foregoing section shall receive the same pay while actually engaged on the business of their mission, as members of the legislature and may appoint a secretary who shall receive the same pay as one of the commissioners; and said commissioners shall make a full report of all their

official proceedings to the legislature at the next meeting thereof.

"Approved Oct. 18th, 1876.

"B. F. OVERTON, *Governor.*"

At the next session of the Chickasaw legislature, on October 17, 1877, an act was passed containing the following provision:

"SECTION 3. *Be it further enacted*, That the provisions contained in article 3, of the said treaty, giving the Chickasaw legislature the choice of receiving and appropriating the three hundred thousand dollars therein named for the use and benefit, on passing such laws, rules, and regulations as will give all persons of African descent certain rights and privileges, be, and it is hereby, declared to be the unanimous consent of the Chickasaw legislature that the United States shall keep and hold said sum of three hundred thousand dollars for the benefit of the said negroes, and the governor of the Chickasaw Nation is hereby requested to notify the Government of the United States that it is the wish of the legislature of the Chickasaw Nation that the Government of the United States remove the said negroes beyond the limits of the Chickasaw Nation, according to the requirements of the third article of the treaty of April 28, 1866.

"Approved October 17, 1877.

"B. F. OVERTON, *Governor.*"

This act was evidently passed in view of all that had occurred and of information given the legislature by the commissioners appointed by the resolution of October 18, 1876, and certainly repeals the act of January 10, 1873, if any repeal was needed, which we do not admit, said act never having become a law by reason of the failure of the "proper authority of the United States" to approve it.

On May 6, 1882, an act of the Chickasaw legislature was approved containing the following provision:

"SECTION 1. *Be it enacted by the legislature of the Chickasaw Nation*, That Wm. L. Byrd and B. F. Overton, delegates of the Chickasaw Nation, are hereby fully authorized and directed to enter their protest in behalf of the Chickasaw Nation against the ratifying by Congress of the United States of an act passed by the general council of the Choctaw Nation adopting and granting to the freedmen of the Choctaw Nation full rights of citizenship without conferring with the Chickasaws, or obtaining their consent to said adoption; and said delegates are hereby fully authorized and directed to represent the Chickasaw people in any and all measures that might be presented before the Department and Congress of the United States affecting the interest of our people and country."

On the 22d of October, 1885, evidently in response to the proposition of the United States contained in the act of May 17, 1882, an act of the Chickasaw legislature was approved containing the following provision:

"SECTION 1. *Be it enacted by the legislature of the Chickasaw Nation*, That the Chickasaw people hereby refuse to accept the freedmen as citizens of the Chickasaw Nation upon any terms or conditions whatever, and respectfully request the governor of our nation to notify the Department at Washington of the action of the legislature in the premises."

The Indian appropriation act of August 15, 1894, contained the following provision:

"SECTION 18. That the approval of Congress is hereby given to 'An act to adopt the negroes of the Chickasaw Nation' and so forth, passed by the legislature of the Chickasaw Nation and approved by the governor thereof January tenth, eighteen hundred and seventy-three, particularly set forth in a letter from the Secretary of the Interior, transmitting to Congress a copy of the aforesaid act, contained in House Executive Document numbered two hundred and seven, Forty-second Congress, third session (28 Stat., 336)."

The Chickasaw statute, relating to the adoption of the freedmen, was enacted five years after the expiration of the period of two years limited in the third article of the treaty of 1866. According to its terms, it was to take "effect from and after its approval by the proper authority of the United States." It was not enacted in pursuance of the scheme defined in the treaty of 1866, which limited the option, therein granted, to a period of two years from the date of the treaty. If it had been promptly approved by the United States, the result would not have been to secure to the Chickasaws any part of the sum of $300,000 mentioned in the treaty, unless the Choctaws had adopted their freedmen and the United States had extended the option which expired in 1868. The Choctaws did not adopt their freedmen until eight years after the passage of the Chickasaw act of 1873. Twenty-one years after its passage, Congress enacted a law purporting to approve the Chickasaw act of 1873.

Every statute is, by implication, a repeal of all prior statutes, so far as it is repugnant thereto. Five years before the Choctaws adopted their freedmen, and eighteen years before Congress enacted the law of 1894, the Chickasaw law of 1873 was repealed by the repugnant act approved October 18, 1876. If the act of 1873 had not been repealed by the act of 1876, it would have been repealed by the repugnant act approved October 17, 1877. If it had not been repealed by the act of 1876, or by the act of 1877, it would have been repealed by the repugnant act approved May 6, 1882. And, finally, if it had not been repealed by either of the three acts last mentioned, it would have been repealed by the repugnant act approved October 22, 1885. And yet, notwithstanding this repeal so strongly re-enforced and emphasized, notwithstanding the vigorous protest made in the act of May 6, 1882, Congress, evidently in ignorance of the facts of the case, enacted the law of August 15, 1894, approving a Chickasaw statute, which had been dead and buried eighteen years.

By subsequent acts of the Chickasaw legislature, the proposition embraced in the Chickasaw statute of January 10, 1873, was withdrawn from the cognizance of Congress. It was not thereafter in the power of Congress to galvanize into life the dead Chickasaw statute. The act of August 15, 1894, was passed in profound ignorance of the fact that the Chickasaw act of 1873 had long before 1894 been repealed by repugnant legislation.

We submit that the act of Congress approved August 15, 1894, did not ratify or confirm anything. There was nothing in existence for it to ratify or confirm. It is hardly necessary to add that it was not and did not purport to be in itself a grant of Chickasaw citizenship to Chickasaw Freedmen.

The Secretary of the Interior has had occasion to decide the question now under consideration. As an authority, it is possible that his decision may not have equal weight, in this court, with the decision of a judicial tribunal. But it certainly is legitimate and proper to present it for the consideration of the court. It is as follows:

> "November 9, 1866, the Chickasaws, by act of their legislature, requested the United States to remove the freedmen from the limits of the Chickasaw Nation, according to the alternative provision therefor in the third article of the treaty of 1866; but no action was taken upon this request. January 10, 1873, the Chickasaws, by an act of their legislature, adopted the freedmen 'in conformity with the third article of the treaty;' but the act contained other provisions intended to explain and define the extent of the adoption, and, by its terms, was to have 'force and effect from and after its approval by the proper authority of the United States.' A copy of this last act was transmitted to Congress by the Secretary of the Interior, as shown by House Ex. Doc. No. 207, 42d Cong., 3d sess.; but no other action was taken thereon until August 15, 1894. In the meantime the Chickasaw legislature had passed

the act of October 22, 1885, declaring 'that the Chickasaw people hereby refuse to accept or adopt the freedmen, as citizens of the Chickasaw Nation, on any terms or conditions whatever, and respectfully request the governor of our nation to notify the Department at Washington of the action of the legislature in the premises.' This act of the Chickasaw legislature was both preceded and followed by memorials and other communications from the Chickasaws, entreating the United States to carry into effect the alternative provision of the third article of the treaty respecting the removal of the freedmen from the nation. (See Senate Ex. Doc. No. 166, 50th Cong., 1st sess., and Senate Doc. No. 84, 55th Cong., 2nd sess.)

"The Indian appropriation act of August 15, 1894 (28 Stat., 286, 336), contains the following:

"'SEC. 18. That the approval of Congress is hereby given "An act to adopt the negroes of the Chickasaw Nation" and so forth, passed by the legislature of the Chickasaw Nation, and approved by the governor thereof January tenth, eighteen hundred and seventy-three, particularly set forth in a letter from the Secretary of the Interior, transmitting to Congress a copy of the aforesaid act, contained in House Executive Document numbered two hundred and seven, Forty-second Congress, third session.'

"The language of this provision is not such as would be appropriate to the enactment of original legislation, such as an adoption of the freedmen into the Chickasaw tribe by congressional enactment, against the consent of the tribe. The terms employed harmonize better with a purpose to merely assent to, or sanction, an act of the tribal legislature supposed to be awaiting assent, or sanction, by Congress. The words used are those of approval and acquiescence, and not those of creation or command. Furthermore, the adoption of the freedmen was not absolutely required by the treaty stipulations of 1866, but, by the terms of that treaty, it was left to the option and discretion of the tribal legislature. If the tribe, by such laws, rules and regulations as might be necessary, gave to the freedmen all the rights, privileges, and

immunities, including the right of suffrage, of citizens of the tribe, except in the annuities, moneys, and public domain of the tribe, and also gave to the freedmen forty acres each of the land of the tribe, on the same terms as the Chickasaws, then certain money was to be paid, by the United States, to the Chickasaw Nation, less such sum, at the rate of one hundred dollars *per capita*, as would be sufficient to pay such freedmen as, within ninety days after the passage of such laws, rules, and regulations, should elect to remove and actually remove from the nation. If such adoption was not made by the tribal legislature within two years from the ratification of the treaty, the money was to be paid by the United States, for the use and benefit of such of the freedmen, as the United States should remove from the Chickasaw Nation, and in that event, the United States agreed, within ninety days after the expiration of said two years, to remove from the nation all such freedmen, as were willing to remove, those remaining or returning after having been removed from the nation, to have no benefit of said money, and to be upon the same footing as other citizens of the United States in said nation.

"While a law of Congress is upon the same footing as a treaty, and will repeal provisions in a pre-existing treaty which are inconsistent therewith, still a repeal will not occur by implication, unless the inconsistency is such that the treaty provision and the act of Congress cannot stand together. There is nothing in the act of August 15, 1894, which shows an intention to withdraw and take from the Chickasaw legislature the option and discretion given by the treaty, respecting the adoption of the freedmen. There is no necessary repugnancy between the treaty and the later congressional enactment, and, therefore, there is no repeal.

"Was the Chickasaw act of January 10, 1873, open to approval, when Congress assented thereto, on August 15, 1894, or had the Chickasaws repealed that act, and withdrawn the proposed adoption of the freedmen? The Chickasaws had not expressly repealed the adopting act; but the subsequent Chick-

asaw act of October 22, 1885, declared that the Chickasaws thereby refused 'to accept or adopt the freedmen, as citizens of the Chickasaw Nation, upon any terms or conditions whatever.' Words could not have been employed, which would have been more repugnant to, or inconsistent with, the terms of the adopting act. The two acts are so completely at variance that both cannot exist together; and therefore the one which contains the latest expression of the legislative will controls and operates as a repeal of the other. When, therefore, Congress passed the act of August 15, 1894, there was no act of the Chickasaw legislature upon which it could operate. The Chickasaw act of adoption was not to become effective until approved by the proper authority of the United States and, since at the time of its repeal such approval had not been given, there seems to be no doubt of the authority of the Chickasaws to withdraw it.

"I am, therefore, of opinion that the Chickasaw Freedmen are not members of that tribe, within the meaning of the provision of the agreement submitting the amended agreement to a vote of the male members of the tribe qualified to vote under tribal laws.

"Very respectfully,

"WILLIS VAN DEVANTER,
"*Assistant Attorney General.*

"DEPARTMENT OF THE INTERIOR, *August* 9, 1898.

"Approved:
"C. N. BLISS, *Secretary.*"

We respectfully submit that the opinion of the honorable Assistant Attorney General is sound and gives to the acts of the Chickasaw legislature and Congress that construction which is proper and consistent with good faith on the part of the Government in dealing with its wards.

Technical rules of construction should never be adopted in such cases, but that construction should be given which would carry into effect the evident intention of the parties. (See vol. 2, Opinions of Attorneys General, 465.)

We respectfully submit that the judgment and decree of the Court of Claims of the United States should be in all things affirmed.

MANSFIELD, MCMURRAY AND CORNISH,
Counsel for The Choctaw Nation and
The Chickasaw Nation, Appellees.

A. A. HOEHLING, JR.,
Of Counsel.

WASHINGTON, D. C., *January* 22, 1904.

NOTE.—At the time of the preparation and printing of the foregoing brief, counsel for appellees have not been furnished with appellants' brief; for which reason counsel reserve the right to make such further reply herein, oral or printed, as may hereafter appear appropriate and necessary.

Supreme Court of the United States.

Nos. 322 and 323.—October Term, 1903.

No. 322.	The United States, Appellant, vs. The Choctaw Nation and the Chickasaw Nation.	Appeals from the Court of Claims.
No. 323.	The Chickasaw Freedmen, Appellants, vs. The Choctaw Nation and the Chickasaw Nation.	

[February 23, 1904.]

These are cross appeals from a decree of the Court of Claims, entered in a suit brought under an agreement between the United States and the Choctaw and the Chickasaw Indians, made the 21st of March, 1902, and ratified and affirmed by the act of July 1, 1902. (32 Stat. 649.)

The controversy is as to the relations of the Chickasaw freedmen to the Chickasaw Nation, and the rights of such freedmen, independent of such agreement, in the lands of the said Indian nations under the third article of the treaty of 1866, between the United States and the said nations, and under any and all laws subsequently enacted by the Chickasaw legislature or by Congress.

There is no dispute about the facts. They are substantially as follows: By treaty of October 20, 1832, the Chickasaw Indians ceded to the United States, for the purpose of sale, their land east of the Mississippi River, and later were permitted to migrate west of that river. By the treaty between the Choctaw and Chickasaw tribes of June 17, 1837, the Chickasaw tribe was permitted to occupy, with the Choctaw tribe, certain territory within the United States, the United States confirming the treaty, and such occupation by a treaty with the tribes June 22, 1855. By this treaty the lands were guaranteed "to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal undivided interest in the whole." By said treaty the said tribes leased to the United States "all that portion of their common territory west of the ninety-eighth degree of west longitude" for the settlement of the Wichita and other tribes of Indians. The leased territory was also to be opened to the settlement by Choctaws and Chickasaws. This is the "leased district" hereinafter referred to. The Choctaws and Chickasaws are separate nations. Upon

the breaking out of the civil war they entered into relations with the Southern confederacy, and took up arms against the United States. On January 1, 1863, the President of the United States, in pursuance of the proclamation of September 22, 1862, issued a proclamation abolishing slavery.

The appellants in No. 323 are the survivors or descendants of the slaves held by the Chickasaw Nation and number about 9,066. The Creeks, Cherokees and Seminoles also rebelled against the United States, and on the 10th of September, 1865, a treaty was entered into at Fort Smith, Arkansas, between them, said Choctaws and Chickasaws and the United States, by which they and the said Choctaws and Chickasaws renewed their allegiance to the United States, and acknowledged themselves to be under the protection of the United States, and covenanted and agreed that thereafter they would in all things recognize the government of the United States, which should exercise exclusive jurisdiction over them. The United States on its part promised to afford ample protection for the security of the persons and property of the respective nations or tribes. The treaty was ratified by the legislature of the Chickasaw Nation.

A treaty was concluded between the United States and the Choctaw and Chickasaw Indians, and proclaimed July 10, 1866. It provided, among other things, as follows:

"ARTICLE II. The Choctaws and Chickasaws hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in punishment of crime, whereof the parties shall have been duly convicted, in accordance with laws applicable to all members of the particular nation, shall ever exist in said nations.

"ARTICLE III. The Choctaws and Chickasaws, in consideration of the sum of three hundred thousand dollars, hereby cede to the United States the territory west of the 98° west longitude, known as the leased district, provided that the said sum shall be invested and held by the United States, at an interest not less than five per cent, in trust for the said nations, until the legislatures of the Choctaw and Chickasaw Nations, respectively, shall have made such laws, rules and regulations as may be necessary to give all the persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, heretofore held in slavery among said nations, all the rights, privileges and immunities, including the right of suffrage, of citizens of said nations, except in the annuities, moneys and public domain claimed by or belonging to said nations, respectively; and also to give such persons who were residents, as aforesaid, and their descendants, forty acres each of the land of said nations on the same terms as the Choctaws and Chickasaws, to be selected on the survey of said land, after the Choctaws and Chickasaws and Kansas Indians have made their selections as herein provided; and immediately upon the enactment of such laws, rules and regulations the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw Nations in the proportion of three-fourths to the former and one-fourth to the latter, less such sum, at the rate of one

hundred dollars per capita, as shall be sufficient to pay such persons of African descent before referred to as within ninety days after the passage of such laws, rules and regulations shall elect to remove and actually remove from said nations, respectively. And should said laws, rules and regulations not be made by the legislatures of said nations, respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw Nations, and be held for the use and benefit of such said persons of African descent as the United States shall remove from the said Territory in such manner as the United States shall deem proper, the United States agreeing, within ninety days from the expiration of the said two years, to remove from said nations all such persons of African descent as may be willing to remove; those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars, or any part thereof, but shall be upon the same footing as other citizens of the United States in the said nations."

The legislature of the Chickasaw Nation has taken action at various times in regard to the said Chickasaw freedmen, as follows:

On November 9, 1866, the Chickasaw legislature passed an act declaring it to be the unanimous desire of the legislature that the United States hold the share of the Chickasaw Nation in the $300,000, stipulated for the cession of the "leased district," for the benefit of the Chickasaw freedmen and remove them beyond the limits of the Chickasaw Nation, according to the third article of the treaty of 1866.

In 1868 similar action was taken by the Chickasaw legislature, asking for the removal, by the United States, of the Chickasaw freedmen from the Chickasaw country.

January 10, 1873, the Chickasaw legislature passed an act by which the freedmen were declared to be adopted in conformity with the third article of the treaty of 1866. Certain conditions were expressed, and it was provided that the act should "be in full force and effect from and after its approval by the proper authority of the United States."

That act was transmitted by the governor of the Chickasaw Nation, by letter of the same date, to the President of the United States, and was submitted by the Secretary of the Interior to the Speaker of the House of Representatives on February 10, 1873, with recommendation for appropriate legislation for extending the time for the execution of the third article of the treaty. The papers were referred to the Committee on Freedmen Affairs, but no action thereon was had at that time.

In October, 1876 or 1877, another act was passed, section 3 of which was as follows:

"SEC. 3. Be it further enacted, that the provisions contained in article 3 of the said treaty, giving the Chickasaw legislature the choice of receiving and appropriating the three hundred thousand dollars therein named

for the use and benefit, or passing such laws, rules and regulations as will give all persons of African descent certain rights and privileges, be, and it is hereby, declared to be the unanimous consent of the Chickasaw legislature that the United States shall keep and hold said sum of three hundred thousand dollars for the benefit of the said negroes, and the governor of the Chickasaw Nation is hereby requested to notify the government of the United States that it is the wish of the legislature of the Chickasaw Nation that the government of the United States remove the said negroes beyond the limits of the Chickasaw Nation, according to the requirements of the third article of the treaty of April 28, 1866."

An act passed October 22, 1885, provided, *inter alia*, as follows:

"SEC. 1. Be it enacted by the legislature of the Chickasaw Nation, That the Chickasaw people hereby refuse to accept or adopt the freedmen as citizens of the Cherokee Nation upon any terms or conditions whatever, and respectfully request the governor of our nation to notify the department at Washington of the action of the legislature in the premises.

"SEC. 2. Be it further enacted, That the governor is hereby authorized and directed to appoint two competent and discreet men of good judgment and business qualifications to visit Washington city, D. C., during the next session of Congress and memorialize that body to provide a means of removal of the freedmen from the Chickasaw Nation to the country known as Ok la ho ma, in the Indian Territory, or to make some suitable disposition of the freedmen question, so that they be not forced upon us as equal citizens of the Chickasaw Nation."

Congress took no action until August 15, 1894, when it passed an act, section 18 of which provided—

"That the approval of Congress is hereby given to 'An act to adopt the negroes of the Chickasaw Nation,' and so forth, passed by the legislature of the Chickasaw Nation and approved by the governor thereof January 10, 1873, particularly as set forth in a letter from the Secretary of the Interior transmitting to Congress a copy of the aforesaid act contained in House Executive Document numbered two hundred and seven, Forty-second Congress, third session." (28 Stat. 336.)

Subsequently, April 23, 1897, an agreement was entered into between the United States and the Choctaws and Chickasaw tribes, which was ratified and confirmed by an act passed June 28, 1898, section 29 of which (30 Stat. 505) provided as follows:

"The agreement between the United States and the Choctaw and Chickasaw tribes of Indians, dated April 23, 1897, and ratified and confirmed by the act of June 28, 1898, section 29 (30 Stat. 505,) provides, *inter alia*, as follows:

"That all the lands within the Indian Territory belonging to the Choctaw and Chickasaw Indians shall be allotted to the members of said tribes, so as to give to each member of these tribes, so far as possible, a fair and equal share thereof, considering the character and fertility of the soil and the location and value of the lands.

"The lands allotted to the Choctaw and Chickasaw freedmen are to be deducted from the portion to be allotted unner this agreement to the mem-

bers of the Choctaw and Chickasaw tribes so as to reduce the allotment to the Choctaws and Chickasaws by the value of the same.

"That the said Choctaw and Chickasaw freedmen who may be entitled to allotments of 40 acres each shall be entitled each to land equal in value to 40 acres of the average land of the two nations,"

These provisions relative to the freedmen are previously qualified as to their holdings of such lands by this clause in the statute, "to be selected, held and used by them until their rights under said treaty shall be determined, in such manner as shall hereafter be provided by act of Congress."

Then came the agreement of 1902. It provides for the allotment of land to each member of the Choctaw and Chickasaw tribes of three hundred and twenty acres and to each freedman "land equal in value to forty acres of the average allottable land of the Choctaw and Chicksaw Nations."

The agreement provides also as follows:

"36. Authority is hereby conferred upon the Court of Claims to determine the existing controversy respecting the relations of the Chickasaw freedmen to the Chickasaw Nation and the rights of such freedmen in the lands of the Choctaw and Chickasaw Nations under the third article of the treaty of eighteen hundred and sixty-six between the United States and the Choctaw and Chickasaw Nations, and under any and all laws subsequently enacted by the Chickasaw legislature or by Congress.

"37. To that end the Attorney General of the United States is hereby directed, on behalf of the United States, to file in said Court of Claims, within sixty days after this agreement becomes effective, a bill of interpleader against the Choctaw and Chickasaw Nations and the Chickasaw freedmen, setting forth the existing controversy between the Chickasaw Nation and the Chickasaw freedmen, and praying that the defendants thereto be required to interplead and settle their respective rights in such suit."

"SEC. 40. In the meantime the commission to the Five Civilized Tribes shall makes a roll of the Chickasaw freedmen and their descendants, as provided in the Atoka agreement, and shall make allotments to them as provided in this agreement, which said allotments shall be held by the said Chickasaw freedmen, not as temporary allotments, but as final allotments, and in the event that it shall be finally determined in said suit that the Chickasaw freedmen are not, independently of this agreement, entitled to allotments in the Choctaw and Chickasaw lands, the Court of Claims shall tender a decree in favor of the Choctaw and Chickasaw Nations according to their respective interests, and against the United States, for the value of the lands so allotted to the Chickasaw freedmen as ascertained by the appraisal thereof made by the commission to the Five Civilized Tribes for the purpose of allotment, which decree shall take the place of the said lands and shall be in full satisfaction of all claims by the Choctaw and Chickasaw Nations against the United States or the said freedmen on account of the taking of the said lands for allotment to said freedmen: Provided, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid."

The agreement was ratified by the Choctaws and Chickasaws by elections September 25, 1902, and became effective on that date. The Court of Claims found the averments in the bill to be true, and found that the third article of the treaty of 1866 remained unaffected by any and all laws subsequently thereto enacted by the said Indian nations or by Congress independently of the agreement of March 2, 1902, and confirmed by act of Congress of July 1, 1902; that the Chickasaw Nation had not conferred the rights upon their freedmen as provided in said treaty or given to them forty acres of land as provided. And further found that none of the said freedmen elected to remove or were willing to remove from said nation, but they did and now do remain therein; that the United States only agreed to remove them if they were willing to be removed. And further, the freedmen, by not electing to remove from the nation and remaining therein, forfeited all benefit to the money mentioned in the treaty, "became in said nation upon the same footing as other citizens of the United States in said nation, and were entitled only to the rights and privileges of such citizens, and were not entitled to the forty acres of land mentioned and described" in said treaty. It was therefore adjudged that, independently of said agreement, the relations of the freedmen to said nation were only those "of citizens of the United States residing in the said nation," and that the said freedmen, independently of said agreement and the aforesaid act of 1902, "have no rights in the lands of the Chickasaw Nation, nor are they, or any of them, under said article entitled to allotments in the lands of the said Chickasaw Nation. The decree concluded as follows:

"And it is further ordered that upon the coming in of the roll and appraisal to be made by the Dawes Commission, as referred to in the said statute, the defendants, the Choctaw and Chickasaw Nations, have leave to apply for an additional decree to be entered at the foot of this decree determining the amount which shall be paid and allowed by the United States to the said Choctaw and Chickasaw Nations, as directed by said statutes; and that the complainant, the United States, be at the same time heard in regard to such amount for which judgment shall be rendered against the United States."

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the Court.

Full quotations have necessarily been made from the statutes and agreements relied on and from the treaty of 1866, but the questions presented are, nevertheless, not complex.

The main, if not crucial, question is, were the freedmen adopted by the Chickasaw Nation as provided in the treaty? They were declared adopted by the act of 1873 upon certain conditions, but the act was only to have force and effect "from and after the approval by the proper authority of

the United States." The United States did not approve until 1894. In the meantime, as early as 1876, the Chickasaws passed an act, by which it was "declared to be the unanimous consent of the Chickasaw legislature" that the United States exercise the right given to it for the benefit of the freedmen by the treaty of 1866. Against the effect of this act several contentions are presented.

It is urged that the negroes became free by the emancipation proclamation and the Thirteenth Amendment to the Constitution of the United States, and acquired thereby all the rights of freemen. That may be granted, but what is its consequence? Certainly not to invest the freedmen with any rights in the property or to participate in the affairs of their former owners. For such rights we must look to the treaty and subsequent legislation and, to a certain extent, to the act which gave jurisdiction of this suit to the Court of Claims. We get no aid from the emancipation proclamation or the Thirteenth Amendment. Prominent, of course, in the inquiry is the act of adoption passed by the Chickasaw legislature in 1873. It responded, in the main, to the treaty of 1866, and if it had force in 1894, when it was approved by Congress, the adoption of the freedmen was made complete. Appellants so contend. They say the act of adoption "was complete in itself and a full exercise of the power possessed by that (Chickasaw) legislature." And, further, if the act were subject to repeal, it was not repealed. The act, it is contended, expressed a wish only and not a purpose, and left to the United States to "follow either of two courses." Counsel say: "It (the United States) could approve the act of adoption of 1873, but it could refuse to approve that act and remove the freedmen as requested by the act of 1876. The power of determining which course should be adopted rested wholly and exclusively with the United States." The argument is plausible, but we cannot assent to it. Besides, the act of 1876 does not stand alone. In 1885—nine years before Congress acted—another act was passed. Its terms were unmistakable. Its declaration was "that the Chickasaw people hereby refuse to accept or adopt the freedmen as citizens of the Cherokee Nation upon any terms or conditions whatever." The governor was requested to notify the department at Washington of the action of the legislature, and was also directed to appoint two competent men to visit Washington and to memorialize Congress "to provide the means of the removal of the freedmen from the Chickasaw Nation to the country known as Oklahoma in the Indian Territory." These two acts must be construed to work a repeal of the act of adoption if it could be repealed by the Chickasaw Nation. The latter is denied, and we are brought to the last contention of appellants in regard to the question of adoption. The contention is that "Congress, by the act approved August 15, 1894, gave life and vitality to the Chickasaw act of January 10, 1873," that is, as we understand the contention, by mere power and disre-

garding whatever of convention there was in the treaty of 1866, and whatever of volition was given to the Indians, the United States peremptorily determined the rights of the freedmen in the lands and affairs of the Indians. Granting, without deciding, that Congress possessed such power, we are forced to believe its exercise, if intended, would have been explicit and direct, not left to be inferred by the approval of the act of 1873. That approval is, of course, an element in the controversy, but to give it the effect which appellants do is to make it practically the sole element, and reduces the case to the inquiry what Congress had willed, not what Congress had agreed to. The act of 1902 certainly contemplated and provided for a different inquiry, one that depended upon the agreements of the United States, not upon its power. And this view is supported by the opinion of the Secretary of the Interior expressed August 9, 1898, and which was presumably known to Congress when it passed the act of 1902. The opinion reviewed the treaty of 1866 and subsequent legislation, and interpreted section 18 of the act of 1894, which approved the act of adoption of 1873, as follows:

"The language of this provision is not such as would be appropriate to the enactment of original legislation, such as an adoption of the freedmen into the Chickasaw tribe by Congressional enactment, against the consent of the tribe. The terms employed harmonize better with a purpose to merely assent to, or sanction, an act of the tribal legislature supposed to be awaiting assent, or sanction, by Congress. The words used are those of approval and acquiescence, and not those of creation or command."

The conclusion was deduced "that the Chickasaw freedmen are not members of that tribe, within the meaning of the provision of the agreement submitting the amended agreement to a vote of the male members of the tribe qualified to vote under tribal laws."

It follows from these views that the freedmen were not adopted into the Chickasaw tribe and necessarily did not acquire the rights dependent upon adoption. They make, however, a specific claim to be beneficiaries of the $300,000.

By the treaty, as we have seen, the United States was to hold that sum in trust for the Indians, to be paid to them upon their conferring certain rights upon the freedmen, and by giving the latter forty acres of land. If such rights were not conferred within two years from the ratification of the treaty the said sum should then be held in trust for said freedmen, and be held and used by the United States for the benefit of such freedmen as should remove from the territory, and the United States agreed to remove within ninety days from the expiration of said two years all such freedmen who should be willing to remove; those who remained or who should return after having been removed to have no benefit of said sum or any part thereof but should be upon the same footing as other citizens of the United States.

The treaty is clear. The Indian nations were to receive the $300,000 if they conferred upon the freedmen the rights expressed in the treaty. Failing to confer those rights, that sum was to be held in trust for all such freedmen, and only such freedmen, as should remove from the territory. The treaty was not complied with either by the Indians or the United States. No rights were conferred upon the freedmen; no freedmen were removed, and the statutes were enacted and the agreements were made that we have described. But those statutes and agreements gave no rights to the freedmen. The only explicit provision for the freedmen was the allotment of forty acres of land to each of them. They claim to be beneficiaries of the $300,000, but the disposition of that under the treaty was to be in the United States, and only to be used for freedmen who should remove from the territory. None have removed. There is an intimation in the brief of their counsel that in their memorials to Congress they expressed a willingness to remove, but Congress did not choose and has not chosen to remove them; indeed, has provided for the exact opposite—provided for the allotment of homes to them out of the lands of the Indians and for payment to the Indians therefor if it should be determined, in this suit, that the freedmen were not, independently of that agreement, "entitled to allotments in Choctaw and Chickasaw lands."

As we hold the freedmen were not so entitled, the decree of the Court of Claims is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.